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FCC Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations
(Terrell and Daingerfield, Texas)

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 1990; Released: January 29, 1990

By the Commission:

1. The Commission has before it an Application for Review filed by Metro Broadcasters, Inc. ("Metro"), licensee of Station KTLR-FM, Channel 296A, Terrell, Texas.[1] The Application for Review requests reversal of the staff's denial of reconsideration of an earlier staff action returning the petition for rule making filed by Metro.[2] For the reasons discussed below, we deny the Application for Review.

BACKGROUND

2. This proceeding began with Metro's filing a petition for rule making that proposed substitution of Channel 295C1 for Channel 296A at Terrell and modification of the Station KTLR-FM license to specify operation on Channel 295C1.[3] In order to accommodate this upgrade, Metro also proposed the substitution of Channel 235C2 in lieu of Channel 295A at Daingerfield, Texas. A Channel 235C2 allotment at Daingerfield would require a site restriction of 33 kilometers. The staff determined that, even assuming maximum power and antenna height, the proposed allotment at Daingerfield with a 33-kilometer site restriction would not provide the requisite 70 dB/u principal city service to Daingerfield required by Section 73.315(a) of the Rules. A Class C2 FM allotment operating with maximum facilities could provide a 70 dB/u signal only to a distance of 32.6 kilometers. Since compliance with the rule would not be possible under the proposal, the staff determined that the Metro rule making petition was defective and returned it.

3. In its Application for Review, Metro does not address noncompliance with Section 73.315(a) of the Rules. Instead, Metro refers to the proposed Channel 235C upgrade by Station KHYI, Arlington, Texas, and the attendant Channel 295A substitution at McKinney, Texas, currently pending before the Commission in MM Docket No. 88-48. Metro notes that its Channel 295C1 proposal (as well as its subsequent Channel 295C2 counterproposal in MM Docket No. 88-48) conflicts with the Channel 295A allotment proposed at McKinney. This, in turn, causes its Terrell proposal to conflict with the Arlington upgrade proposal. For this reason, Metro contends that we should not take any final action concerning its petition for rule making in this docket until MM Docket No. 88-48 is resolved.

DISCUSSION

4. Contrary to Metro's assertion in its Application for Review, the proposed Terrell upgrade was not returned due to a conflict with the Arlington/McKinney proposal in MM Docket No. 88-48 or due to a short-spacing with the Channel 294C allotment at Granbury, Texas. As stated by the staff in its *Memorandum Opinion and Order*[4], the Terrell upgrade proposal is defective because the necessary Channel 235C2 substitution at Daingerfield does not comply with the 70 dB/u principal city coverage requirement of Section 73.315(a) of the Rules. *See Clemson, South Carolina*, 2 FCC Rcd 3583, 3586 (MM Bur.1987); *Wadley and Dadeville, Alabama*, 60 RR 2d 1462 (MM Bur. 1986). We agree with the staff's ruling on reconsideration that a sufficient showing to justify waiver of Section 73.315(a) has not been made. Metro has failed to indicate the amount of the shortfall in principal city coverage. Our own engineering review indicates that approximately 35% of Daingerfield would not receive the requisite 70 dB/u coverage by the proposed Channel 235C2 allotment. We also note that Metro has submitted no evidence that, using our standard prediction method, but relaxing the normal assumption of uniform terrain, its proposed allotment at Daingerfield will comply with our principal city service requirement. *Cf. Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398 (1988). Also, *Bay Shore, New York*, 57 RR 2d 1275 (1985), *recon denied*, 59 RR 2d 1652 (1986), *review denied*, 2 FCC Rcd 1293 (1987), would not be applicable to this situation. The allotment of Channel 276A to Bay Shore was the only possible use of this channel, would provide Bay Shore with a first local service, and would not preclude any other rule making proposal. In contrast, both Terrell and Daingerfield already have local services, and the Terrell/Daingerfield proposal would preclude other rule making proposals. Accordingly, since the basis for returning Metro's petition for rule making was substantive non-compliance with an eligibility rule, the fact that Metro now asks us to review the staff's decision on different grounds is irrelevant. Metro's failure here to comply with Section 73.315(a) is fatal to Metro's proposal, and we see no public interest benefit in considering it in conjunction with mutually exclusive rule making proposals that comply with Commission technical requirements.

5. Accordingly, IT IS ORDERED, That the aforementioned Application for Review IS DENIED.

6. For further information concerning this proceeding, contact Robert: Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION:

Donna R. Searcy
Secretary

FOOTNOTES

[1] Public notice was given on March 15, 1989 (Report No. 1770).

[2] *Memorandum Opinion and Order* in 4 FCC Rcd 750 (MM Bur.1989).

[3] Subsequently, on April 21, 1988, Metro filed a counterproposal in MM Docket No. 88-48 in which it proposed a Channel 295C2 upgrade at Terrell along with the Channel 235C2 substitution at Daingerfield, Texas. The *Notice of Proposed Rule Making and Order to Show Cause* in MM Docket No. 88-48 set forth two competing proposals. 3 FCC Rcd 964 (MM Bur. 1988). The first proposed a Channel 235C upgrade by Station KHYI, Arlington, Texas, and a Channel 295A for Channel 237A substitution at McKinney, Texas. The second proposal proposed allotment of Channel 295A to McKinney as a second local service. A Channel 295C2 allotment at Terrell would conflict with a Channel 295A allotment at McKinney. On November 7,1988, Metro filed a petition for reconsideration directed against the exclusion of its counterproposal from the list of counterproposals appearing in the Public Notice issued in MM Docket No. 88-48. Disposition of the Metro counterproposal and its petition for reconsideration will be made in the Report and Order in MM Docket No. 88-48.

[4] *Supra* n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies

Petition for Waiver of Sections 69.4, 69.111, and 69.112 of the Commission's Rules — Transmittal No. 319

Operator Services

Tariff F.C.C. No. 1

ORDER

Adopted: January 19, 1990; Released: January 19, 1990

By the Chief, Common Carrier Bureau:

1. On July 19, 1989, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of Sections 69.9, 69.111, and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.9, 69.111, 69.112.[1] Bell Atlantic seeks to modify an existing waiver that allows it to charge interexchange carrier (IC) customers a single rate for the provision of two distinct operator services -- line status verification (LSV) and verification with call interruption (VCI). Bell Atlantic's proposed modification would unbundle the rate for these services and, in addition, would expand the offering of LSV and VCI from two states in Bell Atlantic's service territory to its entire territory. Transmittal No. 319, also filed on July 19, 1989, would implement the two rate elements. The proposed effective date of this transmittal is January 21, 1990. No party opposes either the waiver petition or the transmittal.

2. Bell Atlantic currently charges its IC customers a single rate of $.70 regardless of which service is performed on behalf of the IC's customers. Under its proposal, Bell Atlantic would charge $.64 to provide LSV and $.93 to provide VCI. Bell Atlantic explains that a single rate for the two services is no longer required because modifications to its network now enable separate billing for LSV and VCI. Bell Atlantic Petition at 2. It asserts that the implementation of separate rate elements for separate services is in the public interest and is consistent with the Bureau's preference for separate rate elements. *Id.* at 3.

3. The Bureau has reviewed the tariff transmittal and the waiver petition. We find that the public interest is served by the grant of Bell Atlantic's requested Part 69 waiver. We agree with Bell Atlantic that its proposed approach is consistent with our policies with regard to separate rate elements.

4. Accordingly, IT IS ORDERED that the petition for waiver filed by the Bell Atlantic Telephone Companies for the establishment of two separate rate elements for the provision of line status verification and verification with call interruption IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Bell Atlantic Petition for Waiver, filed July 19, 1989 (Petition).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Revisions to Tariff F.C.C. No. 12

Transmittal Nos. 1925, 1926, and 1927

Custom-Designed Integrated Services

ORDER

Adopted: January 22, 1990; Released: January 26, 1990

By the Chief, Common Carrier Bureau:

1. Of the captioned transmittals, Transmittal Nos. 1925 and 1927 would establish two integrated service packages, Virtual Telecommunications Network Service (VTNS) Options 22 and 23, respectively, while Transmittal 1926 would add service features and modify rates and regulations of VTNS Option 3. All three transmittals were filed on November 22, 1989, and are scheduled to become effective on January 27, 1990. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate the provisions establishing new VTNS options; Williams Telecommunications Group, Inc. (Williams) petitioned to reject or suspend and investigate the new VTNS options and the revisions to VTNS Option 3 as well.

2. By Transmittal 1925, AT&T establishes as VTNS Option 22 an arrangement serving the United States, Puerto Rico, and the U.S. Virgin Islands as well as specific international locations. The minimum annual charge for the initial three-year term is $10 million, based on the provision of 517 Measured Remote Ports and 1204 Measured Ports, 275 Data Transmission Capabilities (DTCs) at 9.6 kbps or below, 152 DTCs at 56 kbps, and 75 DTCs at 1.5 Mbps. This configuration is subject to a minimum provisioning constraint of 80 percent of the service element in the original design, and also provides for volume discounts, discretely calculated against the several types of DTCs, when aggregate monthly charges for all DTCs exceed specified levels.

3. By Transmittal 1926, AT&T revises VTNS Option 3 to add service features and modify rates and regulations. Specifically, Option 3 will include Voice Transmission Capabilities (VTCs); additional DTC speeds; service to Puerto Rico, the U.S. Virgin Islands, Canada, Mexico, and other specified international locations; and authorization code calling. Other changes include reduced change charges for 1.5 Mbps DTCs; expanded volume discounts for domestic traffic and the introduction of international volume discounts; and a one-month waiver of installation charges for new VTCs or DTCs.

4. By Transmittal 1927, AT&T establishes VTNS Option 23, a somewhat smaller arrangement than Option 22, with a minimum annual charge of $4.0 million for its initial three-year term, based on the initial configuration of 120 Measured Ports and 586 Measured Remote Ports and 51 domestic and one international VTCs. The initial arrangement also includes 71 domestic DTCs at 9.6 kbps and below, 10 domestic DTCs at 56 kbps, 3 international DTCs at 56/64 kbps, and 18 domestic DTCs at 1.5 Mbps. The use of ports, DTCs, or VTCs in this configuration cannot be reduced below 60 percent of the noted quantities for each service element without prior agreement. The DTC and VTC elements are subject to a volume discount, as are the measured charges applied under several of this option's rate schedules.

5. Sprint asserts in a brief petition directed at the new VTNS options, and in a longer petition originally directed at VTNS Option 17 and incorporated by reference, that AT&T has failed to demonstrate that these VTNS options are consistent with – *i.e.*, "like" – the integrated service packages (ISPs) under review in the Commission's *April 18 Order*,[1] or alternatively to justify the difference in rates and other conditions between the several options and AT&T's component services. Sprint Petition (Options 22, 23) at 1-2. Thus, Sprint contends, AT&T should be required to prepare an integrated VTNS offering. Sprint Petition (Option 17) at 2-4. Sprint also states that the specification of facilities and charges for these options unreasonably restricts them to an individual customer, particularly as the tariff does not define the "substantially different" term in its assurance of general availability. *Id.* at 4-6. Sprint also asserts that deficient cost support information and expenses inconsistent with earlier VTNS options render these options unlawful. *Id.* at 7-13.

6. Williams also argues that the provisions effecting the new VTNS options make them practically available to only one customer, conflicting with the *April 18 Order* and other Commission decisions, including resale and shared use policies. Williams Petition at 6-8. Williams contends that the cost justification for these options is based on unsupported cost and demand assertions, so that major elements of the rate structure are unsubstantiated. *Id.* at 10-11, 17-20. Williams also asserts that there are significant disparities between the projected results and rate structures for the various Tariff 12 options. *Id.* at 10-11, 21, Appendix B. Williams argues that these deficiencies require review of the underlying contract as well as the tariff filing, and states that the proliferation of Tariff 12 offerings requires a broader review of the Commission's approach to integrated service packagess (ISPs). *Id.* at 12-13, 22-25.

7. With respect to Transmittal 1926, Williams argues that the revisions to VTNS Option 3 are a "case in point" for its broad contention that AT&T's revisions of VTNS options early in their terms cannot be reconciled with their original premises of long term contracts and rate stability. It asserts that new rates for Option 3, explained by reference to competitive considerations, undercut the supposed distinctiveness of long-term rate commitments and are also based on contradictory cross-elasticity premises. *Id.* at 14-16.

8. AT&T characterizes Sprint's petition as a summary of its standard arguments that incorporates its past, unsuccessful pleading. AT&T Reply at 1-2. AT&T disputes Williams' generic assertions by stating that its "like" services argument was denied both in the *April 18 Order* and subsequent reconsideration, and that specification of service element quantities was not foreclosed by the *Reconsideration Order*. *Id.* at 5-7. AT&T also asserts that VTNS

does not constrain resale or shared use, and that the new options are cost-justified under the Commission's Rules. *Id.* at 7-9.

9. As to the revisions of VTNS Option 3, AT&T contends that these revisions are not based on a competitive necessity claim, but on a full cost justification showing, so that they do not "impeach" the original filing, and simply reflect that competitive services have become more attractive. *Id.* at 3-4. Nor is Williams' assertion of conflicting cross-elasticity accurate, according to AT&T: the assumption that, absent these revisions, demand would either remain with VTNS or shift to other carriers is consistent with its rate development. *Id.*

10. The Common Carrier Bureau has reviewed AT&T's Transmittals 1925, 1926, and 1927, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

11. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittals 1925 and 1927, filed by US Sprint Communications Company Limited Partnership, and the petition to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittals 1925, 1926, and 1927, filed by Williams Telecommunications Group, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, 4 FCC Rcd 4932 (1989) (*April 18 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989) (*Reconsideration Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-234

In re Applications of

CHARISMA BROADCASTING CORPORATION	File No. BPCT-850207KG
ARLINGTON 68 TV, INC.	File No. BPCT-850418KZ
UNITED BROADCAST GROUP, LTD.	File No. BPCT-850419KE
SOUTHWEST COMMUNICATIONS, LTD.	File No. BPCT-850419KO
JOHNSON TELEVISION, LTD.	File No. BPCT-850422KG
BRISCOE BROADCASTING, LTD.	File No. BPCT-850422KH
CHANNEL 68, NORTH TEXAS TELEVISION LIMITED PARTNERSHIP	File No. BPCT-850422KI
THE LOURAY CORPORATION	File No. BPCT-850422KM
METROPLEX COMMUNICATIONS, INC.	File No. BPCT-850422KP
SAMMY A. THORNTON	File No. BPCT-850422KR
NATIVE AMERICAN BROADCASTING COMPANY, A LIMITED PARTNERSHIP	File No. BPCT-850422KU

For Construction Permit
for a New Television Station
Arlington, Texas

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1990; Released: January 29, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 4018 (1989) (*I. D.*), of Administrative Law Judge Joseph P. Gonzalez (ALJ) granting the application of Channel 68, North Texas Television Limited Partnership (North Texas) for a Construction Permit to establish a new television station at Arlington, Texas. The proceeding is now before the Review Board on exceptions. One of the competing applicants, The Louray Corporation, has not filed exceptions to the ALJ's denial of its application. We will therefore dismiss that application for failure to prosecute, pursuant to 47 CFR §1.276(f). *See, e.g., Salinas Broadcasting Limited Partnership*, 4 FCC Rcd 8325 (Rev. Bd. 1989).

2. While the ALJ favored North Texas as the comparatively superior applicant, four of its competitors, Charisma Broadcasting Corporation, Arlington 68 TV, Inc., Sammy A. Thornton, and Native American Broadcasting Company, contend that the case should be remanded for the addition of financial and related issues against North Texas. Because we are unable to resolve these questions on the present record, we shall direct North Texas to supplement the record as indicated below (para. 10, *infra*).

3. In a companion case, *Global Information Technologies, Inc.*, FCC 90R-5, adopted January 16, 1990, the Board noted a rash of recent exceptions challenging the financial qualifications of potential winning applicants and indicated that, consistent with past practice, it will call for additional information to eliminate record ambiguities or gaps where the information before it does not on its face plainly raise material or substantial questions of fact so as to immediately require a formal remand. *See, e.g., Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1989); *Opal Chadwell*, 4 FCC Rcd 1215 (1989); *Pepper Schultz*, FCC 87I-065, released June 29, 1987; *Colonial Communications, Inc.*, FCC 89R-81, released January 4, 1990; *Coastal Broadcasting Partners*, 4 FCC Rcd 7512 (Rev. Bd. 1989), where both the Commission and Board have attempted to obviate unnecessary remand hearings by requiring that the record be supplemented to eliminate, if possible, narrow or ambiguous gaps in the existing record. *But compare Shawn Phalen*, FCC 89R-82, released January 4, 1990 *and JAM Communications*, 4 FCC Rcd 3754 (Rev. Bd. 1989), where the respective records were disturbed by appreciably more, and where a full remand hearing was legally compelled, because substantial and material questions of fact had *already* been raised and where the adverse evidence, if true, had serious public interest implications. *Compare Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985) ("totality of evidence arouses a sufficient doubt on the point" that hearing is required) with *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd.) (supplemented financial evidence removes ambiguity), *review denied*, 3 FCC 2d 4767 (1988).

4. *Bank Letter.* The exceptions before the Board in this case challenge the purported bank financing of North Texas and question whether that applicant possessed merely an "accommodation" letter insufficient to provide "reasonable assurance."

5. The record reveals that on April 22, 1985, North Texas filed its application and certified to its financial qualifications, specifically noting that:

> Verbal assurances have been provided by a financial institution that it will issue to the applicant a letter giving reasonable assurance that the institution will offer financing to construct and operate the proposed television station. The applicant expects to receive the letter within ten days.

Later, when on June 7, 1985, North Texas amended its engineering proposal, it did not submit a new FCC Form 301. Section III (Financial Qualifications certification); instead it unequivocally "certifie[d] that it is financially qualified to carry forth the proposals contained in this amendment."

6. At hearing, North Texas claimed to have relied upon Mark Stabler, its 17.5% limited partner, to obtain a "reasonable assurance" letter from the bank. In turn, Stabler testified that, prior to agreeing to invest in the applicant, he secured his applicant's business plan, the personal financial statements of the partners, and the resume of Ms. Castro, the sole principal of the corporate general partner. Tr. 4718-19, 4724-25. However, Stabler indicated that he did not share all of this information with the bank, omitting (in particular) the financial statements of the limited partners. Tr. 4725-27. Also, he testified that he offered to Ms. Castro a personal loan guarantee, but the record is silent as to whether he made this offer to the bank. Tr. 4736, 4824.

7. The bank sent Stabler a letter (which he forwarded to Castro) but that letter itself did not demand either personal guarantees or collateral, Tr. 4736-37, and is not in the record. Thus, the record is unclear as to whether the bank letter expressed the requisite "present firm intention to make a loan, future conditions permitting, [which] is the essence of [the Commission's] 'reasonable assurance' standard," *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). *See also Global Information Technologies, supra.*

8. *Unsubscribed Equity*. At filing, 70% of North Texas' equity was not subscribed; North Texas intended to sell this portion for $350,000, which sum was allegedly to be used purely for "prosecution expenses." Tr. of Oral Arg. at 5323. Such a sale never occurred. Instead, the sole general partner increased its initial 10% equity share to 20% (in consideration for Ms. Castro's services); and a 2.5% "limited" partner (Webre) ultimately bought the remaining 60% equity share for $75,000. *See* North Texas Exhs. 1 at 1; 7 at 3; Tr. 4619-20, 4627-29. It is not clear, therefore, whether the alleged bank loan considered these fundamental changes in the financial plan of North Texas.

9. ACCORDINGLY, IT IS ORDERED, That the application of The Louray Corporation (File No. BPCT-850422KM) IS DISMISSED;

10. IT IS FURTHER ORDERED, That Channel 68, North Texas Television Limited Partnership SHALL FILE, within twenty (20) days of the release date of this Order, a supplement containing those documents (1) it originally relied upon; and (2) currently relies upon, to demonstrate its basic financial qualifications; and,

11. IT IS FURTHER ORDERED, That the competing applicants herein MAY FILE responsive comments within ten (10) days of the date of the filing of the supplement.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-532

In re Applications of

RENEE MARIE KRAMER	File No. BPCT-870731KV
SKYLIGHT BROADCASTING, INC.	File No. BPCT-870731KX
CARLO B. McDANIEL and MARY S. McDANIEL d/b/a McDANIEL BROADCASTING PARTNERS	File No. BPCT-870731KY
MANATEE TELEVISION, INC.	File No. BPCT-870731LA
BRADENTON BROADCAST TELEVISION COMPANY, LTD.	File No. BPCT-870731LB
JOYNER COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPCT-870731LC
GULF COAST TELECASTERS LIMITED PARTNERSHIP	File No. BPCT-870731LO

For Construction Permit
for a New Television Station
Bradenton, Florida

Appearances

William J. Sill and *John M. Shoreman*, on behalf of Renee Marie Kramer; *Lawrence M. Miller* and *Glenn S. Rabin*, on behalf of McDaniel Broadcasting Partners; *David L. Hill* and *Audrey P. Rasmussen*, on behalf of Manatee Television, Inc.; *Robert J. Buenzle* and *Henry E. Crawford*, on behalf of Bradenton Broadcast Television Company, Ltd.; *William E. Zimsky*, *Hugh P. Taylor*, and *Byron E. Harrison*, on behalf of Joyner Communications Limited Partnership; and *Aaron I. Fleischman*, *Arthur H. Hardling*, and *Christopher G. Wood*, on behalf of Gulf Coast Telecasters Limited Partnership.

DECISION

Adopted: January 22, 1990; Released: January 29, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. The Review Board has before it the *Initial Decision*, 4 FCC Rcd 2848 (1989) (*I. D.*), of Administrative Law Judge Richard L. Sippel (ALJ), granting the application of Bradenton Broadcast Television Company, Ltd. (BBTC) for authority to construct and operate a new commercial television station on Channel 66 at Bradenton, Florida. [1] Exceptions were filed by Renee Marie Kramer (Kramer), McDaniel Broadcasting Partners (McDaniel), Manatee Television, Inc. (Manatee), Joyner Communications Limited Partnership (Joyner), Gulf Coast Telecasters Limited Partnership (Gulf Coast), and BBTC. The parties also filed reply briefs. Skylight Broadcasting, Inc. did not file exceptions to the *I.D.*, or a reply brief. Its application will be dismissed with prejudice for failure to prosecute. *See* 47 CFR § 1.276(f).

BACKGROUND

2. The *I.D.* awards the Construction Permit at contest to BBTC, finding it comparatively superior to Joyner, and substantially ahead of Manatee, Skylight, Kramer and McDaniel, while disqualifying Gulf Coast on a real-party-in-interest issue. At oral argument, McDaniel frankly conceded that unless the comparative credits awarded by the ALJ to BBTC and Joyner were significantly diminished, its own application would rank "third,"[2] while Gulf Coast limited its argument and its brief to clearing this hearing record of the ALJ's adverse conclusions on the real-party-in-interest issue.[3] Presumably (like Gulf Coast and McDaniel), Kramer and Manatee recognized that they could not overcome either BBTC or Joyner on comparative grounds (assuming we reject the several exceptions directed against these two frontrunners), since their briefs do not seriously argue otherwise, and neither made oral argument to the Board.

3. After our review of the record and the pleadings, we are constrained to affirm the ALJ's selection of BBTC ("with Joyner finishing a close second"), thereby rendering wholly academic the entire slate of unrelated exceptions filed by the other four applicants concerning the ALJ's treatment of their own respective applications. These latter exceptions being entirely nondecisional, we do not rule upon them (*lex non praecipit inutilia, quia inutilis labor stultus)*, [4] save for the exceptions of Gulf Coast seeking to rehabilitate its principals. Here we agree with the exceptor that the *I. D.* critically misapplied the law, later clarified by the Commission in *Cotton Broadcasting Co.*, 4 FCC Rcd 1781 (1989), and hold that the conduct of Gulf Coast and its president, Monroe Berkman, was open, honest, and legally impeccable. We, therefore, vacate *en gros* the erroneous adverse conclusions set forth at *I.D.*, paras. 87-88, and find Gulf Coast fully qualified.[5]

4. Reduced to its purely decisional elements, then, this case turns on the exceptions directed against BBTC and Joyner, and the outcome of their own bilateral challenges. We review those internecine exceptions hereinbelow.

EXCEPTIONS

5. *BBTC*. Structured as a two-tier, "limited"/"general" partnership, BBTC claimed credit for the race, gender, local residence, civic activities, and broadcast experience of its 22% equity holder, and sole "general" partner, Anita Rogers. Since the equity interests of *bona fide* and properly insulated "passive" investors (such as "limited" partners) are not factored into the overall comparative equation, *see generally Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8149-8150 (Rev. Bd. 1989), all of Rogers' personal comparative attributes would be extrapolated to BBLT as a whole at a 100% level, were its limited partnership considered legitimate and not simply a "sham" devised to skew artificially BBTC's essential comparative profile. *See id.*, at 8159.[6]

6. Pursuant to those operative principles, the ALJ reviewed the limited partnership agreement of BBTC, found that its terms adequately precluded the two "limited" partners, who hold 78% of BBTC's equity, from exercising working control over the entity, *I. D.*, para. 60, and concluded that BBTC was a *bona fide* limited partnership entitled to a constructive 100% "integration" credit. *Id.*, paras. 110-111. In reaching this determination, the ALJ held that "[t]he evidence in its totality" did not undercut BBTC's *bona fides* and that other factors in the record affirmatively supported this applicant's claim to legitimacy, *e.g.* :

> Most significantly, it was the general partner who executed and filed the application Form 301, who instructed counsel and the engineer, and who personally convinced a banker to make a commitment to BBTC. Also, it is significant that Ms. Rogers has broadcast and media experience and experience as a businesswoman who has owned her own small newspaper media businesses.

Id., at para. 110. And, while acknowledging that BBTC's limited partners were active in the initial formation of its partnership, he also observed (*id.*):

> The Commission has held that activities subsequent to signing a limited partnership agreement such as filing and prosecuting an application are indicia of active involvement for integration purposes. *Tulsa Broadcasting Group*, 3 FCC Rcd 4541 (Comm'n 1988).

7. Joyner and Kramer attack the efficacy of BBTC's limited partnership, [7] claiming that BBTC is the "brainchild" of its two "limited" partners, Thomas H. Minkoff and Michael Rugers, that Rogers, BBTC's sole "general" partner, played no role in the formative stages of BBTC, and that she merely acquiesced in the original organizational decisions of the two "limited" partners (*e.g.*, selection of counsel, original financing plan, and transmitter site). Citing previous "sham" cases, these exceptors argue that the record evidence reflects that Rogers has not controlled BBTC and it augurs as well a passive role for her in the future. Further, Joyner seeks to make much of Rogers' alleged "pattern over a period of sixteen years of jumping from one job to another, her sporadic employment in low-level journalism and broadcast positions and her ownership of a small monthly newspaper which ended in failure,"[8] and it contends that these circumstances undermine the reliability of her personal "integration" pledge.

8. BBTC replies that its limited partners were interested in supporting a female minority applicant and chose Rogers for her "outstanding broadcast background."[9] It counters also that Rogers actively investigated the limited partnership agreement and the two "limited" partners, and that they did the same with respect to Rogers, after which Rogers thoroughly discussed the arrangement with counsel. BBTC further maintains that, after the partnership agreement was executed, Rogers alone conducted the affairs of BBTC, including rearrangement of the financing, preparation of the budget, amendment of the transmitter site location, and even chosing the corporate name for BBTC.[10] What is more, urges BBTC, Rogers is personally committed to a $40 thousand capital contribution in consideration of her 22% equity interest, of which sum she has paid in a percentage already. [11]

9. *Discussion*. The recent case law holds that, although the Commission will "not hesitate to discredit an integration proposal where convincing evidence reflects that ["limited" partners] will exercise an active, rather than a passive role in the ongoing business," *Susan S. Mulkey*, 4 FCC Rcd 5520, 5520-5521 (1989), it has declared at the same time "that the role played by ["limited" partners] in the formation of an applicant is not necessarily dispositive of whether the applicant, once established, will be secretly managed by its passive investors." *Id.*, at 5520. In determining the *bona fides* and validity of a two-tiered applicant such as BBTC, the Commission will look to "the totality of record evidence." *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988). In the case at bar, the exceptors point to only a few pre-organizational activities of BBTC's "limited" partners, but do not directly dispute BBTC's description of Rogers' active control thereafter. Nor do they dispute her significant financial investment. Moreover, unlike *Metroplex* for example, where we and the ALJ detected a sham, Rogers thoroughly investigated her partners and the partnership, Rogers is the partner with broadcast and other media experience, and Rogers has committed $40 thousand in return for her 22% equity share.[12] On this record as a whole, the recent case law militates toward an affirmation of the *I.D.* and the full BBTC "integration" credit awarded by the ALJ. *Susan S. Mulkey* ; *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988). Or, put in the Commission's terms, there is on this record no "convincing evidence," beyond the fundamental 78%-22% equity disparity, to indicate that Minkoff and Rugers will control the BBTC television station. That is insufficient, *eo ipso*, under currently prevailing FCC policy and case law. *See id.*[13]

10. *Joyner*. Striking in kind, BBTC charges that, in contrast to its own "inherently sound" agreement, it is Joyner's limited partnership contract that is fatally flawed because it insufficently insulates its "general" partner, Arthenia Joyner, a 20% equity holder, from the 80% equity-holding "limited" partners, of whom there are four. *I. D.*, para. 69. Kramer echos this theme. Both trouble elaborately over several provisions in the Joyner contract, which, *inter alia*, calls for a $5 thousand con-

tribution for Ms. Joyner as the "general" partner, in addition to another $25 thousand contribution from her as an "investor."[14] Moreover, they assert that the Joyner agreement provides that, if the "general" partner defaults on her capital contribution(s), the "limited" partners would " . . . have the right, but not the obligation, to make the contribution on behalf of the Defaulting Partner."[15] And, BBTC complains about a Joyner contract provision that permits the "general" partner to provide information and financial reports to partnership. [16]

11. We find that none of the contractual provisions identified by the exceptors is inconsistent with the insulation requirements specified in the Commission's several *Ownership Attribution* policy statements, [17] nor does the case law support the nitpicking arguments in this regard. Though we recognize that the ALJ suggested in passing comment that some questions of insulation were tentatively raised by the subject contract provisions complained of by BBTC, *see I. D.*, para. 69, the ALJ himself thoroughly reviewed those specific provisions, but found nothing therein that would undermine the legal sufficiency of Joyner's limited partnership agreement. Nor do we.

12. BBTC also maintains that no "integration" credit should accrue to its close competitor, because it doubts that Arthenia Joyner, a Tampa probate attorney, will yield sufficient hours from her law practice to devote fulltime to station management. It claims that Ms. Joyner's testimony contains contradictions on her plans for winding-down her practice, and that her failure to have advised current clients of her pending broadcasting proposal to the FCC suggests an inconsistency in her intentions. We reject BBTC's thesis, which is buttressed by nothing more than rampant speculation. As BBTC itself states in its brief, Joyner has represented unequivocally that she will "retire from her law practice and she will hold no outside employment and . . . devote at least 40 hours per week to the management of the station." [18] We find not only no legal gravity in BBTC's purported skepticism over Joyner's "integration" pledge, we find no logical basis in its bald suppositions. Just *why* it is unbelievable that an attorney would exchange a probate practice for ownership and management of a television station BBTC does not ever say, but we take notice of the fact that any number of attorneys (including communications specialists) have migrated from the field of law to a pursuit in broadcasting. BBTC's contentions here are not only wholly conjectual, but idiosyncratic to a fault (if not downright irrational).

13. *Miscellaneous*. Joyner likewise faults the comparative analysis of the ALJ insofar as it awards more local residence and civic activity credit to BBTC, based on Ms. Rogers' residence in Bradenton since 1977, than the *I. D.* awards to Joyner, based on her 38 year residence in the proposed station's service area (but not in Bradenton itself). *I. D.*, para. 118. Despite the creative disputations in Joyner's brief, [19] we agree with the ALJ's reading of our basic *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965) ("residence in the principal community to be served will be of primary importance"), and of the Commission's definititive interpretation of that local residence preference. *See West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 603-607 (D.C. Cir. 1984). Try as it might, Joyner cannot overcome BBTC's local residence advantage.

14. Finally, because we affirm that the ALJ did not err in the overall comparative analysis, particularly as between Joyner and BBTC, we need not vex over whether BBTC was entitled to additional credit as a result of its Spanish-language proposal. [20] In fact, BBTC appears to largely accept our potential disregard of this particular claim, declaring in its brief that "should the *Initial Decision* not be upheld in its entirety, the case must be remanded to the Presiding Judge to take evidence on BBTC's proposed Specialized Programming issue." [21] As with the other nondecisional exceptions of the various parties, we abjure in this secondary dispute.

CONCLUSION

15. All of the exceptions having immediate or probable decisional consequences having been considered, and expressly rejected on the merits, we have no occasion to disturb the ALJ's award to BBTC. Although the contest between it and Joyner may be relatively close, the *Policy Statement's* clear preference for those applicants with past, present, and continued residence in the very community of license is deeply entrenched in the case law and plainly expressed by the Commission. When there is added to that factor the broadcast experience credit accruing to BBTC, [22] Joyner recedes even further astern.

16. ACCORDINGLY, IT IS ORDERED, That the application of Bradenton Broadcast Television Company, Ltd. (File No. BPCT-870731LB) for a Construction Permit for a new television station in Bradenton, Florida IS GRANTED; that the applications of Renee Marie Kramer (File No. BPCT-870731KV), McDaniel Broadcasting Partners (File No. BPCT-870731KY), Manatee Television, Inc. (File No. BPCT-870731LA), Joyner Communications Limited Partnership (File No. BPCT-870731LC), and Gulf Coast Telecasters Limited Partnership (File No. BPCT-870731LO) ARE DENIED; and that the application of Skylight Broadcasting, Inc. (File No. BPCT-870731KX) IS DISMISSED; and

17. IT IS FURTHER ORDERED, That the motion to strike exceptions, filed May 26, 1989 by Bradenton Broadcast Television Company, Ltd, IS DENIED; that the request for permission to utilize demonstrative material at oral argument, filed September 22, 1989 by Gulf Coast Telecasters Limited Partnership IS DISMISSED as moot; and that the petitions for leave to amend, filed September 26 and October 19, 1989, respectively, by Gulf Coast Telecasters Limited Partnership ARE GRANTED, and the amendments ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Board has held this case in abeyance upon the potential for amicable settlement. However, by letter of December 19, 1989, the Board was advised by counsel that no settlement appeared likely. We thereupon took up the exceptions before us.

[2] Tr. of Oral Aug. at 879.

[3] *See id.*, at 898-900.

[4] *See also Newton Television, Ltd*, 3 FCC Rcd 553, 554 (Rev. Bd. 1988) (subsequent history omitted).

[5] Because Gulf Coast's exceptions do not challenge the two frontrunners, BBTC and Joyner, it could not now prevail unless we were to grant the exceptions of the other applicants that do attack the two frontrunners. Since we do not grant those exceptions, we do not address further Gulf Coast's application. However, and while Gulf Coast elected not to frontally challenge the constitutionality of the Commission's racial and gender preferences, Gulf Coast counsel stated that "I think its safe to say that the final word is yet to be said there, and if those [preferences] disappear, we're at least a tie and possibly a winner based on broadcast experience." Tr. of Oral Arg. at 898. (Because the Supreme Court recently granted certiorari in *Metro Broadcasting, Inc., v. FCC*, No. 89-453 (October Term 1989), it may become necessary later to more fully evaluate the relative comparative position of Gulf Coast, since we find that its threshold disqualification was incorrect under *Cotton Broadcasting Co.*, and that it is yet, therefore, a fully qualified applicant).

[6] As discussed in *Metroplex*, the Commission has been all but overrun by sham "two-tier" applicants, and it has recently adopted several measures in an attempt to foil such abuses. *See* 4 FCC Rcd at 8159. Moreover, both the Board and the Commission have rejected many such shams in the routine course of adjudicatory proceedings. *See id.* (and cases cited therein). (The Board Chairman joins neither this footnote nor note 12, *infra.)*

[7] Manatee does not challenge the efficacy of BBTC's limited partnership; instead it attacks as unconstitutional the Commission's race and gender preferences, over which the Board, of course, has no oversight authority. But *see supra*, note 5.

[8] Joyner Exceptions at 16.

[9] BBTC Reply at 12.

[10] *Id.*, at 17-19.

[11] *See id.*

[12] In *Metroplex*, by contrast, the purported "general" partner (1) held a meager 4% interest and contemplated no personal financial investment, (2) never met 8 of the 10 "limited" partners, (3) was instead selected by counsel, and (4) had absolutely no broadcast experience, whereas several of her "limited" partners were broadcast enterpreneurs. *See* 4 FCC Rcd at 8160.

[13] *Compare also Coast TV*, 4 FCC Rcd 1786 (1989) ("integration" credit rejected); *Signal Ministries, Inc.*, 2 FCC Rcd 1259 (1987) (same) (subsequent history omitted).

[14] BBTC Exceptions at 12.

[15] *Id.* (quoting Article X of the Joyner agreement).

[16] *Id.*, at 13-14.

[17] *See* 58 RR 2d 604, 618-620 (1985), on *reconsideration*, 1 FCC Rcd 802 (1986).

[18] BBTC Exceptions at 17. BBTC goes on to claim that Joyner lacked candor in her testimony about her future plans (and other matters), *see id.*, at 20-37; but even apart from our customary deference to the credibility findings of an ALJ, *see, e.g., TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13. (Rev. Bd. 1987) (appellate affirmances omitted), our independent review of the record furnishes no basis to disturb the ALJ's assessment of Ms. Joyner's testimony.

[19] Joyner Exceptions at 27 *et seq.*

[20] BBTC Exceptions at 5-11.

[21] *Id.*, at 7.

[22] The 1965 *Policy Statement* expressly provides for just such credit, *see* 1 FCC 2d at 396.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-75

In the Matter of

Provision of Aeronautical Services
via the INMARSAT System.

EXTENSION OF TIME

Adopted: January 23, 1990; Released: January 25, 1990

By the Chief, Common Carrier Bureau:

1. British Telecommunications plc (BT) has filed a request for extension of time from January 26, 1990 to February 20, 1990 to file reply pleadings in the captioned matter. BT requests the extension in view of the volume of the materials filed in response to its Petition for Reconsideration in this proceeding. BT states that it has contacted all of the parties that responded to its petition and has been informed that they do not object to the requested extension. BT believes that the pleading cycle in this proceeding should coincide with that in I-S-P-90-002. ARINC has concurrently filed a request for extension to February 20 for the time to file reply pleadings in that proceeding.

2. Good cause has been shown for grant of the instant request. The complexity and importance of the issues raised by both BT's petition and the responsive pleadings warrant the requested extension of time to prepare replies. We are simultaneously granting ARINC's request to extend the dates for filing reply pleadings in I-S-P-90-002.

3. Accordingly, IT IS ORDERED that the request of BT is granted, and the time for filing reply pleadings in the captioned matter is extended to February 20, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Provision of Aeronautical Services via the INMARSAT System. ARINC/ATA Request for Waiver. File No. I-S-P-90-002

EXTENSION OF TIME

Adopted: January 23, 1990; Released: January 25, 1990

By the Chief, Common Carrier Bureau:

1. Aeronautical Radio Inc. (ARINC) and the Air Transport Association of America (collectively, ARINC) have filed a request for extension of time from January 26, 1990 to February 20, 1990 to file reply pleadings in the captioned matter. ARINC requests the extension in order to prepare a cogent and comprehensive response to American Mobile Satellite Corporation's (AMSC) opposition to its waiver request. In particular, ARINC seeks additional time to address the technical assertions presented by AMSC in its opposition and to respond to the comments of other participants in the proceeding. ARINC states that it consulted with all of the parties in the proceeding and has been informed that they do not object to the requested extension. ARINC also points out the commonality of subject matter between its waiver request in this proceeding and the Petition for Reconsideration filed by British Telecommunications, plc (BT) in CC Docket No. 87-75. ARINC believes both of these matters should move on similar tracks. BT has concurrently filed a request for an extension to February 20 for the time to file reply pleadings in CC Docket No. 87-75.

2. Good cause has been shown for grant of the instant request. The complexity and importance of the issues raised by both ARINC's Request for Waiver and the responsive pleadings warrant the requested extension of time to prepare replies. We are simultaneously granting BT's request to extend the dates for filing reply pleadings in CC Docket No. 87-75.

3. Accordingly, IT IS ORDERED that the request of ARINC is granted, and the time for filing reply pleadings in the captioned matter is extended to February 20, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-628

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Winslow and Kachina Village, Arizona)	RM-6850

NOTICE OF PROPOSED RULE MAKING

Adopted: December 28, 1989; Released: January 30, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Desert West Air Ranchers Corporation (petitioner), permittee of Station KTDX(FM), Channel 286C, Winslow, Arizona, seeking to amend the FM Table of Allotments by changing the community of license from Winslow to Kachina Village, Arizona, and to reclassify its permit to specify operation on Channel 286C2. Petitioner premises its proposal on the desire to bring a first local service to Kachina Village, which it describes as a growing community.[1]

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[2] In this regard, petitioner asserts that the requested move to Kachina Village is mutually exclusive with the present allotment of Channel 286C at Winslow. The distance between the two reference points is 95.5 kilometers, whereas a distance of 249 kilometers (155 miles) is required by Section 73.207(b) of the Commission's Rules between co-channel Class C and C2 stations. [3] Petitioner states that its proposal could provide a first local broadcast service to Kachina Village, and would not deprive Winslow of local service.[4]

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several states and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Petitioner notes that Kachina Village is not listed in the 1980 U.S. Census, but submits a letter from Coconino County officials advising that Kachina Village will appear in the 1990 U.S. Census as a census designated place.[5]

4. Based on the petitioner's assertions, we inquired at the U.S. Census Bureau ("USCB") concerning Kachina Village's status. The USCB confirmed that although no final determination has been made yet, Kachina Village is expected to be listed as a CDP in the 1990 U.S. Census results. However, its official recognition as a CDP is contingent upon confirmation during the census count, which will commence April 1, 1990, that Kachina Village's population exceeds 1,000. In view of the fact that the USCB currently estimates that Kachina Village's population is 1,800, we propose, under these limited circumstances, to consider it a *de facto* CDP. Therefore, we will not request further demographic data at this time.

5. A staff engineering analysis reveals that Channel 286C2 can be allotted to Kachina Village in conformity with the Commission's rules and regulations.[6]

6. In consideration of the above, we believe it is appropriate to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Kachina Village, Arizona	–	286C2
Winslow, Arizona	236C,286C	236C

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **March 22, 1990,** and reply comments on or before **April 6, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Daniel F. Van Horn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment

which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner advises that figures supplied by the Northern Arizona Council of Governments reflect that Kachina Village's population has increased from 1,250 persons in 1980 to 2,035 persons in 1988, and that its estimated population will exceed 3,200 persons by the year 2,000.

[2] *See Report and Order,* MM Docket No. 88-526, 54 FR 26199, (June 22, 1989); *recon. pend.*

[3] Coordinates used by petitioner for Kachina Village are 35-14-26 and 111-35-48, while those at the site specified in the construction permit for Station KTDX(FM) at Winslow are 35-05-35 and 110-33-50. Petitioner adds that the mutual exclusivity between Winslow and Kachina Village would not be affected if it applied to modify its construction permit to specify a Class C2 channel prior to seeking a change in community of license, since the required separation between Class C2 co-channels is 190 kilometers. However, petitioner asserts that the downgrading is necessary to meet the spacing requirements at Kachina Village. Therefore, petitioner believes it is more efficient to seek modification of the city of license and channel reclassification in the context of the same proceeding.

[4] Station KINO(AM) is presently licensed to Winslow. Additionally, a construction permit has been issued on FM Channel 236C at Winslow (BPH-850711MI).

[5] The Census Bureau generally defines CDPs as closely settled population centers containing at least 1,000 people, without corporate limits, the boundaries of which are defined by the Census Bureau.

[6] Coordinates used in this determination are 35-14-26 and 111-35-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-629

In the Matter of

Amendment of Section 73.202(b),	RM-7031
Table of Allotments,	
FM Broadcast Stations.	
(LaFayette, Georgia)	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 28, 1989; Released: January 30, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Radix Broadcasting, Inc. (petitioner), seeking the allotment of Channel 298A to LaFayette, Georgia, as the community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 298A can be allotted to LaFayette in compliance with the Commission's minimum distance separation requirements with a site restriction 3.9 kilometers (2.4 miles) northeast.[1] We believe the public interest would be served by proposing the allotment of Channel 298A to LaFayette, since it could receive its first local FM channel.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
LaFayette, Georgia	--	298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 22, 1990,** and reply comments on or before **April 6, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lynn S. Gwyn, President
Radix Broadcasting, Inc.
P. O. Box 746
LaFayette, GA 30728

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-44-08 and West Longitude 85-15-32.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-63

In the Matter of

Amendment of Section 73.202(b), RM-6583
Table of Allotments,
FM Broadcast Stations.
(Chubbuck, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 12, 1990; Released: January 30, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Chubbuck Community Broadcasters, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 2304 (1989), proposing the substitution of Channel 253C2 for Channel 252A at Chubbuck, Idaho, and the modification of its license to specify operation on the higher powered channel. Petitioner filed late comments restating its intention to apply for Channel 253C2, if allotted, and a motion to accept those comments.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 253C2 for Channel 252A at Chubbuck, Idaho, since it could provide Station KRCD(FM) with an expanded coverage area. Channel 253C2 can be allotted to Chubbuck in compliance with the Commission's minimum distance separation requirement at the petitioners present transmitter site.[2] In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KRCD to specify operation on Channel 253C2.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 15, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Chubbuck, Idaho	253C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KRCD(FM), Chubbuck, Idaho, IS MODIFIED, to specify operation on Channel 253C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner filed its comments and motion to accept late filed comments on May 31, 1989. The date for filing comments in the proceeding ended May 4, 1989. Since the proceeding is uncontested, petitioner's comments will be accepted for consideration.

[2] The coordinates for Chubbuck, Channel 253C2, are North Latitude 42-55-15 and West Longitude 112-20-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-48

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Gray, Georgia) — RM-6592

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 12, 1990; Released: January 30, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Donald W. Earnhart (petitioner) the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2187 (1989), proposing the allotment of Channel 243A to Gray, Georgia, as that community's first local FM service. Petitioner filed comments stating his intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by allotting Channel 243A to Gray, Georgia, since it could provide a first local FM service to the community. Channel 243A can be allotted to Gray in compliance with the minimum distance separation requirement of the Commission's Rules. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 15, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Gray, Georgia	243A

3. The window period for filing applications will open on **March 16 1990,** and close on **April 16, 1990.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-16

In the Matter of

Amendment of Section 73.202(b),	RM-7119
Table of Allotments,	
FM Broadcast Stations.	
(Ogden, Kansas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 19, 1990; Released: January 30, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Kaw Valley Broadcasting Company (petitioner), requesting the substitution of FM Channel 278C2 for Channel 278A at Ogden, Kansas.[1] Petitioner also requests modification of its license for Station KQLA to specify operation on Channel 278C2. Petitioner submitted information in support of the proposal and stated its intention to file an application for the new channel.

2. Channel 278C2 can be allotted to Ogden, Kansas, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[2] We shall also propose to modify the license of Station KQLA to specify operation on Channel 278C2, as requested. In accordance with Section 1.420(g) of the Rules, we shall not accept other expressions of interest.

3. Accordingly, in order to provide Ogden with its first wide coverage area service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Ogden, Kansas	278A	278C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 22, 1990,** and reply comments on or before **April 6, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Nathaniel F. Emmons
Rachel D. Cramer
Mullin, Rhyne, Emmons
and Topel, P.C.
1000 Connecticut Ave.
Suite 500
Washington, D.C. 20036
(Counsel for the petitioner)

Kaw Valley Broadcasting, Co.
5008 Frontage Road
Rt., 1 Box 104
Manhattan, Kansas 66502

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] A *Report & Order* was adopted on December 13, 1989, in MM Docket 87-36 which modified the license for Station KQLA, Ogden, Kansas, to specify operation on Channel 278A in lieu of Channel 280A.

[2] The coordinates for Channel 287C2 at Ogden are 39-20-20 and 96-38-32.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-75

In the Matter of

Amendment of Section 73.202(b),	RM-6556
Table of Allotments,	RM-6629
FM Broadcast Stations.	
(Casa Grande, Claypool and	
Kearny, Arizona)	

SECOND ERRATA

Released: January 30, 1990

On January 11, 1990, the Commission released a *Report and Order* (DA 89-1682) in the captioned proceeding. In footnote 8, that document incorrectly listed coordinates for the community of Kearny as 32-49-18 and 110-33-04, and the accompanying text in paragraph 10 specified a site restriction of 42.5 kilometers southeast of Kearny. The correct coordinates are 32-48-59 and 110-34-30, and the correct site restriction is 41.1 kilometers (25.6 miles) southeast of Kearny.

In paragraph 16, the *Report and Order* inadvertently specified a filing window for Channel 291A at Claypool, Arizona. An *Errata* dated January 16, 1990, was designed to delete paragraph 16. However, the *Errata* deleted paragraph 15, not paragraph 16. By this *Second Errata*, that portion of the January 16 *Errata* that deleted paragraph 15 is rescinded, and paragraph 16 of the *Report and Order* is deleted.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WARNER AMEX CABLE
COMMUNICATIONS, INC.
Complainant,

v. File No. PA-82-0017

SOUTHWESTERN ELECTRIC
POWER COMPANY
Respondent.

ORDER

Adopted: January 22, 1990; Released: January 29, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 30, 1981, Warner Amex Cable Communications, Inc. filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company had imposed unjust and unreasonable rates for cable television pole attachments. The Commission ruled in favor of the complainant,[1] but subsequently, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Commission's decision for further proceedings. *Southwestern Electric Power Co. v. FCC*, No. 85-1134 (D.C. Cir. Apr. 1, 1987).

2. On January 2, 1990, counsel for complainant and defendant filed a joint motion for dismissal of the complaint with prejudice, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] Warner Amex Cable Communications, Inc. v. Southwestern Electric Power Co., Mimeo No. 2718 (released Mar. 12, 1982); *rev. denied*, FCC 84-655 (released Jan. 7, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 20, 1989

Released: January 29, 1990

Mr. Kerby Confer
President
Keymarket Communications of Columbia, Inc.
804 Carolina Ave.
North Augusta, South Carolina 29841

Dear Mr. Confer:

This refers to your application for renewal of the license of station WTCB Orangeburg, South Carolina (File No. BRH-880727YC). A review of your renewal application reveals violations of the Commission's EEO rules. Accordingly, this letter constitutes a Notice of Apparent Liability for a forfeiture issued pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and that it establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. This enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, *see* Section 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Section 73.2080 (b) and (c), the Commission may impose a variety of sanctions or remedies, such as reporting conditions, submission of a modified EEO program, renewal for less than a full term, forfeiture or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309 (d)(2); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of your renewal application and reply to our letter of inquiry reveals that no substantial and material questions of fact remain with respect to your station and that the grant of your application will serve the public interest. Further, we conclude that you did not discriminate. However, our review does reveal a record of inadequate EEO efforts. In this regard, it appears that you utilized one general circulation newspaper and employee referrals as recruitment sources for the 11 full-time vacancies during the reporting year, *i.e.*, the 12 months prior to the filing of the station's renewal application. You used the newspaper to fill three of the 11 positions, attracting eight applicants, none of whom were minorities. Employee referrals produced four applicants; one for each of four positions, including one black female. The remaining four positions were created to accomodate job applicants, none of whom were minorities. Thus, only one minority was considered for any of the 11 full-time positions[1] and that person was hired one month before you filed your renewal application.

You indicated in your renewal application that you have recently added six minority recruitment sources. In post-renewal application submissions, you indicate that you hired three Blacks prior to the end of the license term, two for upper-level positions. Despite these efforts made in the last months of the license term, we conclude that you failed to establish and maintain regularly throughout the license term an EEO program reflecting positive and continuing efforts to recruit and hire minorities.[2] Moreover, it does not appear that you undertook any self-evaluation of the EEO program until the very end of the license term. First, an analysis of job applicants would have revealed that use of the general circulation paper produced no minority applicants. Notwithstanding the fact that this recruitment source produced no minority applicants, you failed to correct this deficiency by subsequent use of other recruitment sources that were more likely to produce minority applicants. Review of your hiring record would also have revealed that you did not recruit for almost half of the hires. While we note that employee referrals did result in one minority referral and subsequent hire, evaluation of your EEO program would have revealed that these efforts were inadequate to develop a sufficient pool of minority applicants. In view of all of the foregoing, your self-evaluation efforts also were insufficient.

In light of these facts, while we conclude that there are no substantial and material questions of fact relating to discrimination, we find that your station has repeatedly failed to comply with the Commission's affirmative action provisions set forth in Sections 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5) of the Commission's Rules, 47 C.F.R. Section 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5). During the four years preceeding the filing of your renewal application, you neither recruited minorities for full-time vacancies nor analyzed the results of your outreach activity in accordance with the Commission's EEO rule.

In view of the foregoing, as well as our review of pertinent case precedent in this area, we conclude that the renewal applications for station WTCB(FM) should be granted for a full-term subject to reporting conditions. We also find it appropriate to impose a Notice of Apparent Liability for Forfeiture of $10,000.

The record now before us is similar, but somewhat less egregious, than that of the licensee in *WOOJ / WOOJ - FM*, 4 FCC Rcd 6178 (1989), where we granted renewal

for a full-term subject to reporting conditions and a $15,000 forfeiture. Neither WOOJ nor WTCB was able to document any significant efforts until the very end of the license term. In particular, neither WOOJ nor WTCB received any significant minority referrals from their recruitment sources and neither contacted minority referral sources with regard to specific job openings. Further, neither licensee appears to have engaged in any significant self-assessment. However, notwithstanding WTCB's inability to document any efforts, it would appear that some such efforts did occur as is reflected by WTCB's pattern of hiring Blacks full-time in increasing numbers from 1985 to 1987 and its employment of Blacks overall and in the upper-four categories throughout the license term (1985-1988). By way of contrast, no such efforts could be presumed for WOOJ because no Blacks were hired full-time during the license term, despite 35 hiring opportunities. We believe that this distinction warrants a forfeiture assessment here that is lower than that imposed in WOOJ. Accordingly, we will issue a Notice of Apparent Liability for forfeiture in the amount of $10,000.

Accordingly, *IT IS ORDERED*, That the application for renewal of license of Station WTCB *IS GRANTED*, subject to the reporting conditions specified herein. [3]

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, Keymarket Communications of Columbia, licensee of WTCB, is hereby advised of its apparent liability for forfeiture of $10,000 for reported failures to comply with Section 73.2080 of the Commission's Rules in the manner described above.

IT IS FURTHER ORDERED, That the licensee of station WTCB submit an original and one copy of the following information on August 1, 1990, August 1, 1991, and August 1, 1992:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[4]

(b) A list of employees as of the July 1, 1990 payroll period for the first report and as of the July 1, 1991 and July 1, 1992 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin: and

(c) Details concerning the stations' efforts to recruit Blacks for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may telephone the Mass Media Bureau's EEO Branch ((202) 632-7069). With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We acknowledge that during this period, the station also hired one black female part-time on-air personality who was subsequently promoted to the full-time staff. Since the station initially hired the individual on a part-time basis, however, that individual is not counted among full-time hires.

[2] The available labor force for Orangeburg County, South Carolina is 51.1% Black. WTCB employed only one Black among 19 employees (5.3%) in 1985, three among 22 in 1986 (13.6%), five among 25 in 1987 (20%), and two among 18 in 1988 (11.1%). Blacks were even less represented in the upper-level job categories throughout the license term. In 1985, one Black was among 16 employees (6.3%), one among 20 in 1986 (5.0%), three among 22 in 1987 (13.6%), and two among 17 in 1988 (11.8%).

[3] We are mindful of an assignment of license of Keymarket Communication of Columbia, Inc. to Radio South Carolina, Inc. We intend that the forfeiture be assessed on the assignor and that the reporting conditions pass automatically to the assignee. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989).

[4] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MIRACLE STRIP COMMUNICATIONS, INC. Fort Walton Beach, Florida	**BC DOCKET NO. 81-856** File No. BPH-790509AA
JUANINA, INC. OF FORT WALTON BEACH Fort Walton Beach, Florida	**BC DOCKET NO. 81-858** File No. BPH-791114AD
PINNACLE BROADCASTING CORPORATION Fort Walton Beach, Florida	**BC DOCKET NO. 81-859** File No. BPH-791115AB
DA-GON BROADCASTING, INC. Fort Walton Beach, Florida	**BC DOCKET NO. 81-861** File No. BPH-791115AI

For Construction Permit for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1990; Released: January 31, 1990

By the Commission:

1. This proceeding now involves four mutually exclusive applications for authority to construct a new FM station on channel 243C in Fort Walton Beach, Florida. Based upon its initial review of the record, the Commission denied the applications filed by Miracle Strip, Juanina, Pinnacle, and Da-Gon, and granted the application filed by a fifth applicant, Vacationland Broadcasting Company, which sought authority to move the facilities of station WFTW-FM from channel 258A to channel 243C. *Vacationland Broadcasting Co.*, 97 FCC 2d 485 (Rev. Bd. 1984), review denied, 58 RR 2d 439 (1985).

2. The four unsuccessful applicants appealed that initial grant of Vacationland's application to the Court of Appeals for the District of Columbia Circuit. On December 23, 1985, the court, at the Commission's request, remanded the proceeding to the Commission so that it could reconsider its diversification analysis. The Commission subsequently issued a decision reaffirming the grant of Vacationland's application. *Vacationland Broadcasting Co.*, 103 FCC 2d 1191 (1986). Thereafter, Juanina filed a petition to enlarge issues against Vacationland and Pinnacle filed a petition for reconsideration of the Commission's decision reaffirming its initial determination to prefer Vacationland over the other four applicants.

3. Before the Commission disposed of these matters, Vacationland requested the dismissal of its application. In a Memorandum Opinion and Order, released on February 18, 1988, the Commission dismissed Vacationland's application with prejudice, and dismissed as moot the pleadings filed by Pinnacle and by Juanina. *Vacationland Broadcasting Co.*, 3 FCC Rcd 754 (1988). The Commission also directed the General Counsel to seek a further remand from the court so that the Commission could make a grant to the comparatively superior proposal among the remaining applicants. *Id.* at 755 ¶ 8. Following the court's second remand, the Commission did not request, and the parties did not file, comments as to how the Commission should dispose of the case in light of the remand.

4. In a Memorandum Opinion and Order, released on June 23, 1989, the Commission granted the application filed by Juanina, and denied the competing applications filed by Miracle Strip, Pinnacle, and Da-Gon. *Miracle Strip Communications*, 4 FCC Rcd 5064 (1989). Now before the Commission are: (a) petitions for reconsideration filed on July 20, 1989 by Miracle Strip, and on July 24, 1989 by Pinnacle and Da-Gon; (b) an opposition, filed on August 14, 1989, by Juanina; and (c) a reply to opposition, filed on August 24, 1989 by Pinnacle.

5. The petitions for reconsideration are denied. As an initial matter, we are not persuaded by the arguments of Miracle Strip and Pinnacle that a remand for further evidentiary hearings is warranted because the record in this case is more than seven years old. In the absence of evidence that the integrity of the administrative process has been called into question, agencies are generally not required to conduct additional evidentiary hearings before issuing a decision simply because considerable time has elapsed since the hearings. *Bowman Transportation v. Arkansas - Best Freight System*, 419 U.S. 281, 294-96 (1974) (citing *ICC v. Jersey City*, 322 U.S. 503, 514-15 (1944)). *See* also *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 665-66 & n.12 (D.C. Cir. 1984) ("an extremely heavy burden looms before a party seeking to overturn final administrative order on grounds of staleness."). There is no evidence that the record in this case has become deficient in any way. Thus, the age of the record, standing alone, does not warrant a remand for further hearings in this already protracted proceeding.

6. As the Commission explained in its June 23, 1989 Memorandum Opinion and Order, a further remand was not required to determine which of the four remaining applicants would best serve the public interest, because "the ALJ and the Review Board made all the relevant factual determinations concerning the remaining applicants." 4 FCC Rcd at 5064 ¶ 4. Pinnacle argues, however, that the Commission should have disregarded as inherently unreliable findings and conclusions concerning Juanina because such findings were not decisionally significant and merely incidental to the Board's decision granting Vacationland's application. There is no merit to this argument. Our administrative process would grind to an abrupt halt if we remanded a case whenever its ultimate resolution turned on a finding or a conclusion that was not, at that time, critical to the resolution reached by the Board.[1]

7. Nor is Miracle Strip correct that the Commission's June 23, 1989 Memorandum Opinion and Order is procedurally deficient because the case was never briefed and argued before the full Commission. Miracle Strip's 1984 Application for Review was filed under a previous version of 47 C.F.R. § 1.115(b)(5), which contained a "note" stating that the Commission "will generally permit the parties to file briefs and present oral argument."[2] Miracle Strip explains that, given the ten-page limitation on applications for review, it concentrated on issues relating to the Board's selected winner, Vacationland (which subsequently dismissed its application) rather than on issues relating to the other applicants. Thus, Miracle Strip decided not to raise other matters in its Application for Review, such as its claimed preference for proposing a classical music format. Miracle Strip believed that it would have a chance to raise this issue when the Commission requested briefs and oral argument.

8. The Court of Appeals, however, rejected this argument in *Ventura Broadcasting Company v. FCC*, 765 F.2d 184 (D.C. Cir. 1984). It determined that such briefing and oral argument was not required where the Commission's decision turned on an issue not decisionally significant to the Review Board's Decision (and therefore not fully addressed in the parties' applications for review). In doing so, the court held, first, that the Commission had not violated section 1.115(b), which "d[id] not mandate argument and briefing in every case." *Id.* at 194. *See* also *American International Development, Inc.*, 50 RR 2d 370, 371-72 ¶ 4 (1981). Second, the court found that procedural fairness did not require such briefing and argument since the Appellant had filed exceptions in support of its appeal from the ALJ's initial decision, which were part of the record and therefore available to the Commission when it reviewed the Board's decision. Thus, the court reasoned that "[Appellant's] arguments were fully presented to the Commission," and that the Commission had not "acted without adequate opportunity for comment on the part of [Appellant]." *Id.*

9. Neither the Commission's rules nor procedural due process required briefs and oral argument in this case. Even if the Board's selected winner (Vacationland) had dismissed its application before the Commission deleted the rule permitting briefs and oral argument, the Commission could have reviewed the record and determined which of the remaining applicants would best serve the public interest without permitting briefs and oral argument. Neither the subsequent deletion of the "note" from section 1.115(b)(5) nor the lapse of time since the filing of Applications for Review in 1984 requires that the Commission give Pinnacle a chance to raise arguments that it chose not to include in its 1984 Application for Review. [3]

10. In this regard, Pinnacle's arguments have been adequately considered in the record before the Commission. It filed exceptions to the initial decision that were part of the record and available to the Commission when it granted Juanina's application on June 23, 1989. To the extent that Pinnacle requests that we permit briefs and oral argument so that it can now argue matters not included in its Application for Review, Pinnacle would be precluded from raising in its brief any matter that has not been raised in its exceptions. *See* 47 C.F.R. § 1.277(a) (arguments not raised in exceptions to an initial decision are waived). Thus, even if Pinnacle was misled by the now-deleted "note" into omitting certain arguments from its 1984 Application for Review, Pinnacle's arguments have been adequately presented to and reviewed by the Commission.[4] Therefore, we find that no purpose is served by permitting briefs and oral argument at this time.

11. Having determined that we need not remand this case for further hearings or schedule it for briefing and oral argument, we turn to the merits of the pending petitions for reconsideration. Pinnacle and Miracle Strip assert that the integration proposals of Juanina's 90 percent owner, John Matkowski, and 10 percent owner, Katherine Shea, are not credible. However, questions concerning Matkowski's health and his promise to give up his lucrative dental practice have been raised, and rejected, at various stages of this proceeding.[5] It is well established that the Commission does not grant reconsideration to permit reargument of matters that it fully addressed in its decision. *WWIZ, Inc.*, 37 FCC 685 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1965).

12. To the extent that petitioners rely on the current state of Matkowski's health, they offer nothing more than concerns about Matkowski's ulcers and bad back, which were explored at the hearing, to support their claim that he could be physically unable to fulfill his integration proposal. In light of record evidence that these are Matkowski's only health problems and that neither problem is serious enough to prevent him from operating or managing the station, petitioners' allegations that, given the lapse of seven years since the hearing record was compiled, Matkowski and Shea are now incapable of effectuating their integration proposals are purely speculative and do not warrant reconsideration.

13. Although Miracle Strip characterizes Matkowski as an "aging, white male" whose current health is "unknown," broadcast applicants have an affirmative obligation under section 1.65 of the Commission's rules, 47 C.F.R. § 1.65, to report substantial changes in any matter of decisional significance to the Commission. However, Juanina has not reported any change in the health or commitment of either Matkowski or Shea.[6] Miracle Strip alleges that information which is critical in evaluating the credibility of Matkowski's integration proposal is missing from the record, but it does not specify exactly what is missing. Under these circumstances, we cannot assume, based either on the owners' ages or the lapse of more than seven years since the hearing, that Matkowski and Shea will be unwilling or unable to fulfill their commitments to be integrated full time at the proposed station. The integration proposals of Juanina's two owners, Matkowski and Shea, therefore merit 100 percent quantitative integration credit.[7]

14. In its petition for reconsideration, Da-Gon challenges the Commission's determination that its integration proposal is quantitatively and qualitatively inferior to the integration proposals of Miracle Strip and Juanina. Da-Gon specifically objects to the Commission's finding (4 FCC Rcd at 5067 n.2) that arguments concerning Da-Gon's quantitative integration credit are not properly before the Commission because Da-Gon's exceptions to the initial decision did not raise these matters. However, it is immaterial whether Da-Gon waived the argument that its integration proposal is quantitatively equal to the proposals of Juanina and Miracle Strip because "control is control whether it be 100% or 51%." Despite its finding that Da-Gon had not filed exceptions on this point, the Commission specifically addressed Da-Gon's control argument

in its June 23, 1989 decision. The Commission explained why meaningful distinctions could be drawn among applicants proposing different amounts of integration, even though all of the applicants proposed to integrate a controlling owner. 4 FCC Rcd at 5066 ¶¶ 19-23. The Commission also explained why Da-Gon would rank qualitatively behind Juanina and Miracle Strip even if all three integration proposals were determined to be quantitatively equal. *Id.* at 5066-67 ¶ 24 & n.3. As noted above, the Commission does not grant reconsideration to permit reargument of matters that were fully addressed in its decision. *WWIZ, Inc.*, supra.

15. Da-Gon further urges that minority ownership should be considered under diversification rather than integration. However, the Commission has repeatedly refused to consider minority ownership under the diversification criterion. *See, e.g., Radio Jonesboro, Inc.*, 100 FCC 2d 941, 948 ¶ 12 (1985). We see no reason to depart from this approach. *See* also *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990*, Pub. L. No. 101-162, 103 Stat. 1020-1021 (signed Sept. 21, 1989). Under these circumstances, it is inappropriate for the Commission to make any change in its treatment of minority ownership at this time. Thus, there is no reason to modify the June 23, 1989 decision granting the application filed by Juanina.

16. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration filed on July 20, 1989 by Miracle Strip Communications, Inc., and on July 24, 1989 by Pinnacle Broadcasting Corporation and by Da-Gon Broadcasting, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* 47 C.F.R. § 1.267(b), which directs Administrative Law Judges to make findings on all material issues. *See also Enterprise Broadcasting, Inc.*, 60 FCC 2d 852, 856 ¶ 13 (1976). In *Enterprise*, the ALJ had disqualified one of the applicants. Although the Board reversed the ALJ's disqualification of that particular applicant, a further remand was unnecessary because the ALJ had made contingent comparative findings regarding that applicant. On appeal, the Commission found that the Board's reliance on those findings was proper. In doing so, the Commission rejected the argument that the contingent findings should be disregarded as mere "dicta." The Commission explained that "[t]he logic of this procedure [having the ALJ make contingent comparative findings] is clear: if (as here) the reviewing authority determines the applicant should not have been disqualified, further review of the comparative treatment can be made without delay of remanding for comparative conclusions."

[2] The full text of the note was as follows: "If the Commission grants an application for review of a final decision of the Review Board, it will generally permit the parties to file briefs and present oral argument. Thus, the application for review should be prepared with the understanding that its purpose is not to obtain a Commission decision on the merits of the issues but rather to convince the Commission to review those issues."

[3] We note that, as a general matter, a party's failure to accurately anticipate the Commission's action ordinarily does not give it the right to raise matters that could have been considered at an earlier stage of an adjudicatory proceeding. *See, e.g., Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (broadcast applicants not entitled to sit back in anticipation of favorable result and then parry with additional evidence if decision is unsatisfactory); *Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984) (surprise not good cause for untimely intervention request).

[4] To the extent that Miracle Strip renews its exception on the specialized programming issue, the ALJ found that Miracle Strip had not demonstrated that its classical music programming would meet an unfulfilled need for such specialized programming in Fort Walton Beach area. In accordance with precedent, the ALJ properly refused to add the requested issue under these circumstances. *See Memorandum Opinion and Order*, 82M-2059 (July 2, 1982).

[5] *Vacationland Broadcasting Co.*, 97 FCC 2d 499, 514 ¶ 60 (ALJ 1983), affirmed, 97 FCC 2d 485, 492 ¶¶ 13-14 (Rev. Bd. 1984), review denied, 58 RR 2d 439 (Commission 1985). Pinnacle attacks the Commission's decision as procedurally deficient. Pinnacle asserts that the June 23, 1989 decision did not address "significant factual issues raised by Pinnacle in its May 18, 1984 Application for Review relative to the qualifications and integration pledge of Juanina's John Matkowski." Pinnacle Petition for Reconsideration at 2. However, when the Commission denied Pinnacle's Application for Review in 1985, it "examined the four applications for review and the contentions of the parties" and explicitly "adopt[ed] the findings of the Review Board." *Vacationland*, 58 RR 2d at 440 ¶ 3 (1985).

[6] Pinnacle contends that, in light of Matkowski's willingness to deceive the Commission with respect to affidavits secured in connection with the ascertainment issue against Da-Gon, Juanina cannot be relied upon to report changes in the health or intentions of Matkowski. There is no merit to this contention. First, Pinnacle previously sought to have a misrepresentation issue specified against Juanina based on allegations that Matkowski submitted false affidavits to the Commission, but the ALJ concluded that an issue was unwarranted. *Memorandum Opinion and Order*, FCC 83M-170 (released January 14, 1983). The Review Board affirmed the ALJ's refusal to add the requested issue, *Vacationland*, 97 FCC 2d at 496-97 ¶ 27, and the Commission did not modify this portion of the Board's Decision. *Vacationland*, 58 RR 2d at 440 ¶ 3. Second, Pinnacle does not point to any specific information which Juanina failed to report to the Commission pursuant to section 1.65.

[7] Miracle Strip also disputes the Commission's further determination that Miracle Strip's integration proposal is qualitatively inferior to that of Juanina. It particularly objects to the finding that its credit for female ownership is outweighed by Juanina's enhancement credits for local ownership, civic participation, and broadcast experience. According to Miracle Strip, this decision contravenes Congress' explicit direction in appropriations legislation that the Commission continue its policy of fostering female ownership of broadcast stations. *See Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and elated Agencies for the Fiscal Year Ending September 30, 1989*, and for *Other Purposes*, Pub.L. No. 100-459, 102 Stat. 2186, 2216-17 (1988). Notwithstanding Miracle Strip's claim, our decision in favor of Juanina did not improperly dilute Miracle Strip's enhancement credit for female ownership. The Commission's decision relied on precedent in effect

when Congress enacted the appropriations legislation. Under that precedent, female ownership has less significance than local ownership. *See Radio Jonesboro,* 100 FCC 2d 941, 945 ¶ 8 (1985); *Horne Industries, Inc.,* 98 FCC 2d 601, 602-03 ¶ 4 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-13

In the Matter of

Amendment of Section 73.202(b), RM-7090
Table of Allotments,
FM Broadcast Stations.
(White Hall, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1990; Released: January 31, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Carl Jones (petitioner) seeking the allotment of FM Channel 283A to White Hall, Arkansas, as that community's first local broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering analysis of the proposal reveals that Channel 283A can be allotted to White Hall in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 6.0 kilometers (3.7 miles) east[1] of the community to avoid short-spacing to Channel 283A, Camden, Arkansas,[2] and to Station KMJX(FM), Channel 286C1, Conway, Arkansas. [3]

3. In view of the fact that White Hall could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
White Hall, Arkansas	–	283A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 23, 1990,** and reply comments on or before **April 9, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Carl Jones
P.O. Box 2800
Pine Bluff, AR 71613

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates used for Channel 283A at White Hall are 34-15-15 and 92-01-49.

[2] Coordinates used for Channel 283A at Camden, AR, are 33-35-06 and 92-50-00.

[3] Coordinates at the licensed site of Station KMJX(FM) are 34-47-53 and 92-29-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-12

In the Matter of

Amendment of Section 73.202(b), RM-7087
Table of Allotments,
FM Broadcast Stations.
(Thousand Palms, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 12, 1990; Released: January 31, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Jeffrey Rochlis (petitioner) seeking the allotment of FM Channel 234A to Thousand Palms, California, as that community's first local broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering review has determined that Channel 234A can be allotted to Thousand Palms consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 3.0 kilometers (1.9 miles) east[1] of the community to avoid short-spacing to Station KTWV-FM, Channel 234B, Los Angeles, California.[2] Additionally, as Thousand Palms, California, is located within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission must obtain concurrence of the Mexican Government in this proposal.

3. In view of the fact that Thousand Palms could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Thousand Palms, California	--	234A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 23, 1990,** and reply comments on or before **April 9, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Lewis J. Paper, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates used in this determination are 33-49-20 and 116-21-57.

[2] Coordinates at the licensed site of Station KTWV-FM are 34-13-29 and 118-03-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-289

In the Matter of

Amendment of Section 73.202(b), RM-6680
Table of Allotments,
FM Broadcast Stations.
(Syracuse, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 17, 1990; Released: January 31, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 5015 (1988), issued in response to a petition filed on behalf of William A. Dixon (petitioner), proposing the allotment of Channel 278A to Syracuse, Indiana, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 278A to Syracuse, since it could provide a first local broadcast service to that community.

3. As indicated in the *Notice*, Channel 278A can be allotted to Syracuse in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1] Additionally, as Syracuse is located within 320 kilometers (199 miles) of the U.S.-Canada border, the Commission obtained concurrence of the Canadian government in the proposal.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 16, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Syracuse, Indiana	278A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 278A at Syracuse, Indiana, will open on **March 19, 1990,** and close on **April 18, 1990.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used in this determination are 41-25-40 and 85-45-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-24

In the Matter of

Amendment of Section 73.202(b), RM-6540
Table of Allotments,
FM Broadcast Stations.
(Princeville, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 12, 1990; Released: January 31, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Charles Carrell ("Carrell"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1447 (1989), proposing the allotment of Channel 250C1 to Princeville, Hawaii, as a first local FM service. Petitioner filed supporting comments restating his interest in applying for the channel. FM 97 Associates ("FM 97"), licensee of Station KFMN(FM), Lihue, Hawaii, and Kilohana Broadcasting, Inc. ("KPOI"), licensee of Station KPOI(FM), Channel 248C1, Honolulu, Hawaii, filed comments. Petitioner and KPOI submitted reply comments.

2. The *Notice* raised the issue of whether Princeville is a community for allotment purposes, since it is not listed in the 1980 U.S. Census. In response, Carrell states that he was informed by U.S. Census Bureau that Princeville was in fact listed in the 1980 Census with a population of 500 people. He was also informed that Elisha Allen, a Judge of the Supreme Court of Honolulu, incorporated the city of Princeville in 1867. In addition, Carrell states that Princeville maintains its own post office and zip code. It has condominia, residences, shopping center, restaurants, administrative offices, the Sheraton Princeville Hotel and the 27-hole championship Princeville Makai Golf Course.

3. FM 97, in its comments, supports the allotment of a first local FM channel to Princeville, but objects to the selection of Channel 250C1. FM 97 believes the public interest would be served by allotting a different channel to Princeville to avoid the potential confusion among listeners on the Island of Kauai. FM 97 states that confusion is possible particularly with the recent popularity of digital tuners on which the frequency number appears. FM 97 feels that listeners may mistakenly tune their dial to 97.9, when in fact, they intended to listen to FM 97. In this regard, FM 97 had a channel search performed which reveals the existence of 22 alternative available Class C1 channels that can be allotted to Princeville. FM 97 states that it recognizes that the potential for listener confusion and the existence of congestion on the FM band are not factors that would justify denying an allotment, however, FM 97 urges the Commission to consider any of 22 other available channels that could be allotted to Princeville.

4. KPOI, in its comments, urges the Commission to allot Channel 292, 293, 294, 295, 296, or 297 to Princeville. It questions the need for a C1 FM allotment to a community of 500 persons, but it takes no position on the ultimate allotment of a channel to Princeville, if the Commission is satisfied that it is a community for allotment purposes. KPOI states that allotting Channel 250C1 to Princeville will have an adverse impact on the public's reception of Station KPOI(FM), which is only 400 kilohertz removed from the dial position sought by Carrell for Princeville, because KPOI operates on 97.5, Channel 248C1. KPOI states that its service is extensively carried on the Island of Kauai by cables. In order to receive the signal of KPOI, the cables must not receive interference from an outside source. KPOI states that from its site on Oahu to Kauai Channel 248C1's signal could be severely degraded by adjacent channel interference from Channel 250C1 at Princeville. KPOI urges the Commission to allot Princeville one of the channels at the upper end of the FM dial.

5. Carrell, in his reply comments, states that the proximity of channels of which FM 97 complains has not bothered the Commission in the past and the reasons advanced by FM 97 provide no reason for a change of Commission policy. Carrell also states that KPOI is located some 120 miles from Princeville, and of that distance approximately 95 miles are over water. Therefore, Carrell argues, KPOI has no standing to protest the use of Channel 250C1 at Princeville, since the proposed allotment is far beyond any protected contour of KPOI. In addition, argues Carrell, the cable receivers sought to be protected by KPOI are located at or near Lihue, on the southern coast of the Island of Kauai, and Princeville is on the northern coast, and there should be no interference or degradation of the KPOI signal as received on the Island of Kauai. Carrell goes on to state that he is not adverse to the allotment of another Class C1 channel to Princeville, and should the Commission allot a channel other than 250C1, he will apply for the channel. However, he expresses a strong preference for a channel not at either the extreme lower or extreme upper end of the FM dial. He states that Channels 240, 251, 255, 256, or 260 would be acceptable to him, and should placate both FM 97 and KPOI.

6. Based on the information presented in this case, we believe that Carrell has provided us with sufficient data to conclude that Princeville is a community for allotment purposes. As stated by Carrell in his comments, Princeville is in fact listed in the 1980 Census with a population of 500 people. Princeville maintains its own post office and zip code. It has condominia, residences, a shopping center, restaurants, administrative offices, the Sheraton Princeville Hotel and the the 27 hole championship Princeville Makai Golf Course. This evidence is sufficient to demonstrate Princeville's identity as a community and to support our finding that Princeville is a community for allotment purposes. We believe the public interest would best be served by the allotment of Channel 255C1 to Princeville, Hawaii, as a first local service. An engineering analysis confirms that Channel 255C1 can be allotted to Princeville, Hawaii, in compliance with the minimum distance separation requirements of the Commission Rules.[1] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the

Commission's Rules, IT IS ORDERED, That effective **March 16, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Princeville, Hawaii	255C1

7. The window period for filing applications will open on **March 19, 1990,** and close on **April 18, 1990.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 255C1 at Princeville, Hawaii, are North Latitude 22-00-00 and West Longitude 159-22-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-56

In the Matter of

Amendment of Section 73.202(b), RM-6589
Table of Allotments,
FM Broadcast Stations.
(Montezuma and Zebulon Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 12, 1990; Released: January 31, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Hogan Broadcasting System (petitioner) the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2177 (1989), proposing the allotment of Channel 223A to Zebulon, Georgia, as the community's first local FM service. In addition, the *Notice* proposed the substitution of Channel 236A for Channel 223A at Montezuma, Georgia, to accommodate the allotment of Channel 223A at Zebulon. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 223A at Zebulon, Georgia, since it could provide the community with its first local FM service. The allotment can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.1 kilometers (0.7 miles) south to avoid a short-spacing to Station WZGC, Channel 225C1, Atlanta, Georgia.[1] As indicated in the *Notice*, in order to allot Channel 223A at Zebulon, it is necessary to substitute Channel 236A for Channel 223A at Montezuma. Channel 223A was allotted to Montezuma, Georgia, in MM Docket 84-231 and made available for application in Window No. 37. Macon County Broadcasting Co. is the applicant for Channel 223A at Montezuma (ARN-871123MC). Channel 236A can be allotted to Montezuma in compliance with the Commission's minimum distance separation requirements and can be used at reference coordinates of the allotment and the site specified in the pending application of Macon County Broadcasting.[2]

3. Channel 223A can be allotted to Zebulon, Georgia, in compliance with the Commission's minimum distance separation requirement with a site restriction. In addition, we shall also substitute Channel 236A for Channel 223A at Montezuma, Georgia, and in accordance with Commission policy, retain the applicant's cut-off status, since the classes of the channels are equivalent. *See* Phillipsburg, Kansas 48 FR 10844 (1983). The applicant will be permitted to amend its application to specify the new channel.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 16, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Montezuma, Georgia	236A
Zebulon, Georgia	223A

5. The window period for filing applications for Zebulon, Georgia, will open on **March 19, 1990,** and close on **April 18, 1990.**

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the applicant for Channel 223A at Montezuma, Georgia, as follows: Macon County Broadcasting Co., P. O. Box 511, Montezuma, Georgia 31063.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau.

FOOTNOTES

[1] The coordinates for Channel 223A at Zebulon are North Latitude 33-05-36 and West Longitude 84-20-34.

[2] The coordinates for Montezuma, Channel 236A, at the application site, are North Latitude 32-17-58 and West Longitude 84-01-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-64

In the Matter of

Amendment of Section 73.202(b), RM-6584
Table of Allotments,
FM Broadcast Stations.
(Island Park, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 12, 1990; Released: January 31, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Island Broadcasters (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2306 (1989), proposing the allotment of Channel 293C to Island Park, Idaho, as that community's first local FM service. Petitioner filed comments stating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 293C to Island Park, Idaho, since it could provide a first local FM service to that community. Channel 293C can be allotted to Island Park in compliance with the minimum distance separation requirements of the Commission's Rules.[1] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 16, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Island Park, Idaho	293C

3. The window period for filing applications will open on **March 19, 1990,** and close on **April 18, 1990.**

4. IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Island Park, Channel 293C, are North Latitude 44-23-30 and West Longitude 111-18-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Requests of 25 large	File Nos. X-1690 - 1694
oceangoing cargo ships	X-1697 - 1712
for exemption from	X-1715, X-1717
radiotelegraph requirements	X-1726 - 1727

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1990; Released: January 31, 1990

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed April 5, 1989, by the Radio-Electronics Officers Union and American Radio Association (ROU/ARA) of the Private Radio Bureau's (the Bureau) *Memorandum Opinion and Order*, 4 FCC Rcd 2100 (Spec. Serv. Div. 1989) (*Order*), approving the above-captioned requests for exemption from the radiotelegraph requirements of Title III, Part II of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. §§ 351 - 354, and of Chapter IV of the International Convention for Safety of Life at Sea, 1974, TIAS 9700 (Safety Convention). Exxon Communications Company (Exxon) and Cove Ventures, Inc., Cove Liberty Corp., and Cove Trading, Inc. (collectively "Cove") filed oppositions, and ROU/ARA filed a reply.

2. For reasons discussed below we find that the routes or conditions of the voyages and other circumstances are such as to render it unnecessary to require the ships to comply with the manual Morse code radiotelegraph requirements of the Communications Act or Safety Convention. Therefore, we will affirm the exemptions granted by the Bureau.

II. PROCEDURE

3. Exxon filed a Motion to Strike ROU/ARA's reply on procedural grounds on June 1, 1989, arguing that Section 1.115 of the Rules, 47 C.F.R. § 1.115 does not permit such a pleading unless specifically requested by the Commission. Section 1.115(d), however, does permit the pleading. Further, the staff granted ROU/ARA's request for extension of time to file the reply on April 27, 1989, and Exxon was notified of the grant. Accordingly, Exxon's Motion to Strike will be denied.

III. BACKGROUND

4. Section 352(b) of the Communications Act permits the Commission to exempt cargo ships from the traditional manual Morse code telegraphy equipment requirements if in the course of their voyages they do not go more than 150 nautical miles from the nearest land and if the Commission considers that the routes or conditions of the voyages or other circumstances are such as to render a radio station unreasonable or unnecessary for the purposes of the Communications Act. Regulation 5 of Chapter IV of the Safety Convention permits exemptions where the maximum distance of the ship from the shore, the length of the voyage, the absence of general navigational hazards, and other conditions affecting safety are such as to render the radiotelegraph station unreasonable or unnecessary. For a fuller discussion of the manual Morse telegraphy requirements, changes in technology and law, and other factors bearing on exemptions see *Requests of 22 large oceangoing cargo ships for exemption from radiotelegraphy requirements*, 3 FCC Rcd 4127 (Spec. Serv. Div. 1988), *aff'd*, 4 FCC Rcd 1521 (1989), *appeal docketed sub nom. Radio - Electronics Officers Union v. FCC*, No. 89-1248 (D.C. Cir. April 13, 1989) (*Ship Exemptions I*).

5. The exemption requests before us are for ships that are required by the Safety Convention and the Communications Act to carry manual Morse code telegraphy equipment and also manual Morse code telegraphy operators. Their various voyages are within 150 nautical miles of land between Alaska, the West Coast of the 48 contiguous states, Panama, and the U.S. East or Gulf Coast. The ships seeking the exemptions would carry a variety of state of the art equipment for voice and data communications instead of manual Morse code telegraphy equipment.

IV. DISCUSSION

6. The voyages covered in the pending exemption requests are similar to the voyages proposed by the ships which were granted exemptions in *Ship Exemptions I*, *supra*, that is, between Alaska, the coasts of the 48 contiguous states, and Panama. Each of these ships will carry at least as much radio equipment as required of those ships. In this and the earlier proceeding ROU/ARA's arguments fall into three categories:

a. The Commission lacks statutory authority to grant the exemptions;

b. Granting the exemptions would have an adverse impact on national security; and

c. Granting the exemptions would decrease safety of ships at sea.

These arguments were thoroughly discussed and evaluated in *Ship Exemptions I*. We concluded that we had authority to grant those exemptions and that they would not in any way have an adverse impact on maritime safety or national security.

7. Briefly stated, Section 352(b) of the Act permits the Commission to exempt vessels from the radiotelegraph requirements based on, among other things, the route of the voyage. *See American Radio Ass'n v. FCC*, 690 F.2d 334 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). Additionally, the Navy has confirmed that the grant of the exemptions would have no adverse impact on national security. *See* Letter from C.A.H. Trost, Chief of Naval Operations to Chairman, Federal Communications Commission (April 22, 1988). Because the Navy does not utilize manual Morse code radiotelegraphy for ship-to-ship or ship-to-shore communications there is no interoperability problem.

8. Throughout ROU/ARA's pleadings there has been the suggestion that granting the exemptions would compromise safety on the ground that radiotelegraphy is superior to any other system for distress and safety communications. The Commission rejected that argument in 1982 when it adopted a general exemption, 47 C.F.R. § 80.836(c), for ships with specified state of the art equipment on voyages along the coasts of the 48 contiguous states. *Amendment of Part 83*, 89 FCC 2d 40, *passim* (1982), *aff'd sub nom. American Radio Ass' n v. FCC*, *supra*. The argument is even less valid today. The systems to be carried by these ships provide multiple pathways for distress and safety communications, and this redundancy increases the probability that vital messages will get through. Additionally, because knowledge of Morse code is not required to operate the alternative communications equipment, almost any person aboard ship could be trained to operate these systems, providing greater flexibility than manual Morse radiotelegraphy in distress situations. Accordingly, as in the previous exemptions, there is no merit to ROU/ARA's arguments.

9. In the application for review ROU/ARA make a number of detailed arguments on points which they believe were insufficiently treated by the Bureau in its *Order*. They emphasize their argument that such a decision required a notice and comment rule making proceeding, they expand on their argument concerning national security, and they argue that the Bureau failed to answer satisfactorily points they had raised concerning safety.

A. ***Statutory Authority***

10. ROU/ARA reiterate their argument that the nature of the decision on the exemption requests, which they characterize as "evisceration" of the radiotelegraph requirements of the Communications Act, was such as to require a notice and comment rule making pursuant to the Administrative Procedure Act. ROU/ARA, 6-12. To support this they cite *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) and *Maritel*, 3 FCC Rcd 4690, 4692 (1988). They say that by granting the 25 exemptions the Bureau has ruled that any ship that travels within 150 miles of land and carries specified equipment no longer will have to be equipped with a radiotelegraph station or carry radio officers, so that the exception has become the rule. ROU/ARA, 6-7. They also state that, while the United States has endorsed the Global Maritime Distress and Safety System (GMDSS)[1], which is to be implemented in the 1990's, it is committed to maintain the present system until then. The Commission, they charge, has pursued a policy of forcing the maritime industry to a radio telegraphy free system as soon as possible, ignoring this commitment. ROU/ARA at v.

11. ROU/ARA's characterization of the nature of our actions is overbroad. We have not decided that a ship on routes within 150 miles of land anywhere in the world can be exempted. Rather, we have used our discretionary authority to grant waivers in the specific factual situations before us. These waivers are a logical extension of the general exemption for coastwise voyages along the 48 contiguous states to voyages along the coasts of North and Central America to Panama, but do not preclude us from denying waivers in future cases if the facts so warrant.

12. ROU/ARA's argument that the nature of the exemption decisions required notice and comment rule making and was not appropriate for an adjudicatory proceeding is without merit. Agency authority to make adjudicatory decisions that have policy implications has been clear since *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). It has been estimated that less than half of policy making with substantial impact is done through notice and comment procedures. 2 K. Davis, *Administrative Law Treatise* § 7.20 (2d ed. 1979). The APA requires notice and comment procedures for rules, not adjudications with policy implications. In any event, in this proceeding, however, the affected parties, the unions and shipping owners and operators, have participated fully. ROU/ARA argue that the Commission has no way of knowing whether all interested parties have in fact had an opportunity to participate. ROU/ARA, 11. The Commission is familiar with parties interested in this matter because of its administrative experience pertaining to maritime communications, radio officers and safety at sea generally. The Commission is confident that it has heard a variety of views submitted by interested parties and that ROU/ARA's vigorous efforts to publicize the two ship exemption proceedings and to promote their viewpoint would have included any organization of which the Commission was not previously aware from its prior rule makings affecting radio officers and safety at sea.

13. ROU/ARA question our reliance on *SEC v. Chenery*, *supra*, and its progeny and cite various lower court cases and Commission decisions to support their argument that notice and comment rule making is required. ROU/ARA, 8-12; ROU/ARA Reply, 5-6. Their view is mistaken. In particular they fail to acknowledge that an agency has discretion as to how to proceed in a particular situation. *SEC v. Chenery*, *supra*, is the leading case in this area,[2] and in that case the Supreme Court said, "the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *id*, 203. *See also NLRB v. Wyman - Gordon Co.*, 394 U.S. 759, 765 (1969) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). The Commission's discretion specifically has been discussed and confirmed in *Chisholm v. FCC*, 538 F.2d 349, 364-366 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976), and more recently in *Turro v. FCC*, 859 F.2d 1498 (D.C. Cir. 1988). Our choice to proceed by considering individual exemption requests on a case-by-case basis, rather than adopting a general rule is a reasonable exercise of our discretion. At this point, we believe the public interest is better served by examining exemptions on a case-by-case basis than proceeding by rules. In contrast, in *Maritel*, cited by ROU/ARA we exercised our discretion to proceed by rule making rather than to decide the interference issues raised in the context of an individual application.

14. ROU/ARA cite a number of lower court cases to support their view that rule making is required. They place their greatest reliance on *First Bancorporation v. Bd. of Governors*, 728 F.2d 434 (10th Cir. 1984), in which the court found that it is an abuse of discretion for an agency to adopt general policy by an adjudicative order. They also cite *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982) and *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980). ROU/ARA, 10; ROU/ARA Reply, 5-6. In those three cases agencies had sought to adopt, in adjudicatory proceedings, new requirements that dramatically changed existing agency requirements and resulted in a new, broad general requirement that would prospectively apply to everyone in the industry, even though some were not a party to the proceeding. In

contrast, the ship exemptions granted herein apply only to those particular entities before us. While the policy determinations underlying our grant of the exemptions herein may be applied in future cases, we will continue to act on a case-by-case basis. Thus, under our decision today, no ship operator is required to operate under an exemption nor is it necessarily entitled to an exemption if it requests one. In these circumstances, no broad, prospective, general policy that imposes new requirements on a broad class of regulated entities within an industry is being adopted. Therefore, these cases are distinguishable and do not require a rule making in this instance.

15. ROU/ARA's argument that we have made the exception the rule, abandoning the radiotelegraphy distress and safety system contrary to the Communications Act and the Safety Convention and forcing the maritime industry to adopt the GMDSS ahead of schedule, is especially lacking in merit. Our actions have been taken within the framework of the Communications Act and Safety Convention, which specifically permit exemptions on a case-by case basis. [3] Without an exemption a ship is required to carry manual Morse radiotelegraph equipment. With an exemption a ship is required to carry equipment that will receive and send the distress signals required by alternative, and we believe more reliable, systems. No ship is required to operate under an exemption or to carry any satellite or other modern equipment required for an exemption, and we have made no decisions here that bind us in future cases.

B. ***National Security***

16. ROU/ARA continue to try to read the April 22, 1988, letter, *supra*, from the Chief of Naval Operations stating that the Navy had "no objection" to granting exemptions as saying the opposite. Further, they attempt to interpret a May 6, 1988, letter from his subordinate, Admiral Layman, to support their argument that ship exemptions undermine national security. ROU/ARA, 16-20. These arguments are completely without merit. We note that ROU/ARA does not refer to a subsequent letter from Admiral Layman confirming that his May 6 letter "does not alter nor supersede the . . . position [of the Chief of Naval Operations stated in his April 22 letter]." Letter from Admiral Lawrence Layman to Mr. R.H. McNamara (June 3, 1988).

17. ROU/ARA state that every time the Commission exempts a ship, the number of jobs for radio officers decreases and some leave the profession, thus diminishing the pool available for national defense purposes. ROU/ARA 20. Whether our actions are likely to decrease the number of radio officers available is open to question as it does not appear likely that these waivers will significantly affect the employment prospects of radio officers. We have received informal complaints from ship operators that there is a severe shortage of radio officers. We also received comments to this effect in our rule making proceeding in Gen. Docket No. 88-37 concerning ship radio officers. *See Report and Order*, 3 FCC Rcd 63 61, 6366 n. 8 (1988). We have not received complaints from radio officers that they are unable to find work, and in light of the foregoing it is unlikely that these waivers will significantly affect their ability to do so. In short, ROU/ARA's argument that the number of qualified radio officers available will be depleted and the national security will be affected is unpersuasive.

18. ROU/ARA also argue that radio officers are needed on board ships for national security purposes because they are the only personnel on merchant ships who are trained to communicate with military vessels in time of war or crisis. ROU/ARA, 19. The ROU/ARA suggestion that only licensed radio officers can be trained in special procedures for communication with Navy ships is simplistic. The Navy does not use manual Morse telegraphy for communications with merchant ships. Thus, a number of crew members could be trained in the necessary procedures in accord with changing circumstances. Additionally, and most important, the Navy has no objection to our exemptions on national security or any other grounds. Therefore, ROU/ARA's arguments concerning national security can be given little weight.

C. ***Safety***

19. ROU/ARA state that the purpose of the law requiring all U.S. cargo ships of 1600 gross tons or more to be equipped with a radiotelegraph station and radio officers is to provide a pool of mutual assistance by the use of radiotelegraphy so that ships can communicate directly with each other so that each may act as a potential lifeboat for other ships. Each time a ship is exempted from the radiotelegraph requirements, they say, the effectiveness of the existing system is weakened because fewer ships participate in the pool. ROU/ARA, 6-7, 12. We addressed this argument at length in *Ship Exemptions, I, supra*, 2102-3. In short, because of the diversity of modern equipment the ships will carry and because of decline in use of radiotelegraphy by ships of leading maritime nations, neither their safety nor the safety of ships that may need to communicate with them in distress situations will be diminished. The pool of mutual assistance will not be weakened.

20. ROU/ARA argue that the *Order* failed to discuss some specific arguments they raised concerning safety. For example they state that the *Order* did not discuss with sufficient specificity their point that the COVE LEADER is 30 years old. ROU/ARA Reply, 4. ROU/ARA did not, however, explain why the age of the COVE LEADER should disqualify it for an exemption. Further, the *Order* discussed that argument, in para. 9, by saying that the possibility that the ships requesting exemptions may encounter distress situations is not a sound argument against granting the exemptions because the equipment they will carry will provide communications reliability equal or superior to radiotelegraphy.

21. ROU/ARA had provided charts to illustrate areas where the ships' routes would carry them out of the range of VHF and MF coast stations, but, they state, the *Order* brushed this concern off by stating that the ships would carry a variety of equipment and not rely solely on the MF distress and calling frequency 2182 MHz. This is insufficient, ROU/ARA argue, because other types of equipment operate on HF frequencies and are not reliable in all circumstances in that HF propagation conditions vary. According to ROU/ARA, the special skills of radiotelegraph operators are needed to transmit and respond to distress communications quickly. ROU/ARA, 14-15. ROU/ARA is apparently referring to the fact that the various HF bands vary in their propagation as to whether it is day or night, or over the longer term, in response to sunspot activity. Any operator, however, whether a licensed radio officer or not, becomes familiar with HF propagation through experience and knows

which HF bands are "in" at a given time. Many thousands of oceangoing vessels of less than 1600 gross tons, for example, which are not required to carry radio officers, have sophisticated radio equipment, including HF equipment, and sail all over the world. They have no difficulty in communicating on equipment which uses HF frequencies. In any event, HF radio is not the only means of communications required to be carried by the exempted vessels.

22. ROU/ARA state that the *Order* did not respond to their "evidence" that general radiotelephone operators are not adequately trained to operate and maintain the ships' safety and distress systems. ROU/ARA, 15-16. The *Order* requires, as does the general exemption for coastwise voyages along the 48 contiguous states, that the ship while at sea must have the capability to operate and maintain all the ship systems used for safety and distress. The Commission does not specify how this capability is to be achieved, but leaves it up to the ship operator. We note that the same systems used for safety and distress are used for communications generally, so compliance with this requirement is in the ship operator's self interest. ROU/ARA's "evidence" concerning inadequate training concerned topics covered in courses to prepare for the general radiotelephone operator examination. They presented no information to suggest inadequate maintenance on ships operating under existing exemptions.

23. ROU/ARA state that the *Order* ignored their arguments that not all ships participate in the Automated Mutual-Assistance Vessel Rescue (AMVER) system, that the effectiveness of the AMVER system is not proven for routes along the coasts of Central America, and that the majority of large cargo ships do not carry satellite or SITOR equipment. ROU/ARA, 15. One reason for requiring exempted ships to participate in AMVER is to provide the U.S. Coast Guard with the ship's location in case of a distress situation. This requirement may have less meaning for routes along the coasts of Central America. It is, however, only one of many requirements for the exempted ships to enhance their ability to communicate and be located in distress situations.

24. Even assuming that ROU/ARA is correct in saying that the majority of large cargo ships worldwide do not carry satellite or SITOR equipment (radio teletype equipment which operates on HF frequencies), this is not a cogent argument against granting the exemptions. The variety of equipment required will help ensure the ability to communicate in distress situations. Further, if another ship is within a fairly short range, the ships could communicate by voice on VHF or MF frequencies. If two ships are thousands of miles apart, the ability to communicate ship to ship by any means, whether manual Morse telegraphy on an HF frequency or by satellite, would be of limited help in a distress situation. It should be noted that the keystone of the telegraphy distress system, 500 kHz, on which all ships are required to keep a watch for an "SOS", whether by means of a radio officer on duty or an auto alarm receiver, has a dependable range of a few hundred miles. Indeed the Safety Convention, Chapter IV, Regulation 10 (g-1) specifies a range of 150 miles.

V. DECISION

25. In view of the discussion above, it is clear that the Commission has statutory authority to grant the exemptions, that there is no adverse impact on national security, and that there is no adverse impact on safety.

26. IT IS THEREFORE ORDERED that the application for review filed by ROU/ARA IS DENIED.

27. IT IS FURTHER ORDERED that the Private Radio Bureau's *Memorandum Opinion and Order*, 4 FCC Rcd 2100 (Spec. Serv. Div. 1989) IS AFFIRMED.

28. IT IS FURTHER ORDERED that the motion to strike filed by Exxon IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The GMDSS is an improved distress system, using modern technology, developed over a period of many years in the International Maritime Organization (IMO) for ships subject to the Safety Convention. It may also be used by ships not subject to the Safety Convention. ROU/ARA have a special concern with the GMDSS operator/maintainer requirement issue, which is associated with the employment of dedicated radio officers. They have articulated their concern in the IMO and in the International Telecommunication Union as well.

[2] The Court validated the administrative rule making and expressed a preference for such "quasi-legislative" rule making where appropriate. However, the Court also said, "But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise . . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule . . . . an administative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity . . . . There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. *SEC v. Chenery*, *supra*, 202-3.

[3] Section 352(b) of the Communications Act and Regulation 5 of Chapter IV of the Safety Convention specifically permit exemptions. *See* para. 4, *infra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRANSNATIONAL TELECOM, LTD. File No. S-C-L-90-001

Application for a license to land and operate in the United States a private submarine cable between the continental United States and the State of Hawaii.

CABLE LANDING LICENSE

Adopted: January 24, 1990; Released: January 31, 1990

By the Chief, Common Carrier Bureau:

1. The Bureau has under consideration the above-captioned application filed by Transnational Telecom, Ltd. (TTL) on October 2, 1989, requesting a license to land and operate in the United States a fiber optic submarine cable system (Aloha) between the continental United States (CONUS) and the State of Hawaii. The applicant proposes a privately owned system in which capacity in the cable would be sold or leased to users on a non-tariffed, non-common carrier basis. The application was placed on public notice on October 4, 1989. No comments were filed.

2. The proposed cable's CONUS/Hawaii link would contain at least two working optical fiber pairs, with each pair carrying a basic system module of 560 Megabits per second (Mbps). The landing points on the U.S. west coast and Oahu, Hawaii have yet to be selected. The cable is scheduled for operation in December, 1992. The entire system, including plant and equipment, will be owned entirely by TTL. TTL is a corporation organized and existing under the laws of the State of Delaware. All of TTL's officers and directors are U.S. citizens.

3. TTL believes that its proposal will result in significant public benefits. It states that the privately owned system will provide needed additional voice, video, and data transmission capacity between the mainland and Hawaii. TTL states that Aloha will interconnect with continental U.S., Hawaiian long distance, and transpacific basin telecommunications networks. TTL claims Aloha will offer secure, high quality, high speed communications to private, public (common carrier), and government users. TTL notes the Commission's view that private cable systems could benefit users by providing new alternatives to satisfy their needs.[1] TTL points out that the Commission has found the specific benefits of non-common carrier communications systems, which: (1) permit the providers of capacity to make tailored and flexible arrangements with customers that are not possible under the regimen of a tariffed service offering; (2) enable customers to make long-term plans for the use of facilities with assurances as to facility availability and price; (3) permit systems to be specifically designed to customer's needs; and (4) result in positive market development for new and innovative service offerings.[2] TTL claims Aloha will offer additional service benefits through the application of advanced communications technologies such as Integrated Services Digital Network (ISDN) [3] and Private Branch Exchanges (PBXs).[4] It adds that the cable will facilitate the emergence of Hawaii as a crucial hub for commerce and communications from the Pacific region to CONUS, and help integrate Hawaii into the national broadband network of the 1990s. In addition, TTL states that Aloha will be timely and economically viable as it will complement recent White House plans for a high speed data and communication infrastructure by linking appropriate research centers located in Hawaii with those in the U.S. mainland. TTL believes U.S. government defense agencies will also benefit from the secure, broadband digital transmission capacity of Aloha.

4. TTL notes that HAW-4 provides the only fiber optic connection between the mainland and the State of Hawaii and provides the only fiber optic link between TPC-3 and the U.S. mainland. TTL states, however, that HAW-4/TPC-3 is fully subscribed and has no available spare capacity. TTL projects that Hawaii's growing economic activity and strategic importance as a hub for Pacific telecommunications networks will create substantial demand for fiber optic capacity to the U.S. mainland. TTL notes that international users as well will benefit from the high speed, low error, wide band, and inherently secure communications facilities made available by fiber optic systems. TTL asserts that non-dominant international carriers and foreign administrations have become more receptive to the use of independent facilities for their communications needs. TTL claims the Aloha cable would offer restoration and redundancy services for other CONUS/Hawaii fiber optic facilities. It adds that Aloha would spur intramodal and intermodal competition in the provision of transmission facilities, thereby exerting a downward pressure on prices for users on both ends of the Aloha facility. Finally, TTL emphasizes that neither U.S. ratepayers nor shareholders of major U.S. common carriers will be at any economic risk since the fiber optic cable will be funded by the owners of TTL.

5. Finally, TTL states that, because its application is for non-common carrier offerings, and there is no public interest reason for the Commission to require the Aloha facilities to be offered on a common carrier basis, the application need not be evaluated pursuant to Title II of the Communications Act of 1934, 47 U.S.C. Title II (1976). Instead, argues TTL, the Commission need only consider the application pursuant to the Cable Landing License Act, 47 U.S.C. Sections 34-39 (1964).

DISCUSSION

6. In its application, TTL requests that it be granted a license to land and operate a private submarine cable system under the Commission's private submarine cable policy. The Commission adopted this policy in 1985 to promote competition in the provision of international transmission facilities.[5] The Commission granted Private Transatlantic Telecommunications System, Inc. (PSI), formerly Tel-Optik, Ltd., a cable landing license to land and operate a private optical fiber transatlantic cable system (PTAT) between the United States and the United Kingdom.[6] The Commission authorized PSI to sell or lease

capacity in its PTAT system on a non-common carrier basis. In 1987, pursuant to the policy established by the Commission in authorizing the PTAT system, the Common Carrier Bureau granted a cable landing license to Pacific Telecom Cable, Inc. (PTC) to land and operate a private fiber optic North Pacific submarine cable system (NPC) between the United States and Japan. Consistent with Commission policy, the Bureau authorized PTC to sell or lease capacity on the NPC system on a non-common carrier basis.[7]

7. In authorizing PTAT and NPC, the Commission and the Bureau applied the NARUC I standards in evaluating whether the proposed cables could be authorized to operate on a non-common carrier basis or should be classified as common carrier systems.[8] To be classified as a common carrier, the cable operator must offer service indiscriminately to whatever public its service may legally and practically be of use. In the NARUC I decision, the court offered a two-part test to determine when an operation should be classified as common carrier: "We must inquire, first, whether there will be any legal compulsion . . . to serve [the public] indifferently, and if not, second, whether there are reasons implicit in the nature of . . . [the] operations to expect an indifferent holding out to the eligible user public."[9] We find, after examining TTL's proposal in light of the NARUC I standard, that its proposed system would not be a common carrier operation and therefore need not be evaluated pursuant to Title II of the Communications Act.

8. First, the proposed offerings are not included within the definition of common carriage. TTL proposes to sell or lease bulk capacity tailored to the particular requirements of individual customers. The Commission previously found in its Transponder Sales decision that the sale or long-term lease of domestic satellite transponders by satellite owners does not constitute common carrier activity.[10] In that decision, the Commission considered the definition of common carriage as set forth in the NARUC I decision and concluded that sellers of domestic satellite transponders do not hold themselves out indifferently to serve the user public. In authorizing proposals to provide service via private fiber optic cables in both the North Atlantic and Pacific regions, the Commission and the Bureau found no distinction between those proposed facilities and what the Commission found to be non-common carrier activity in the Transponder Sales decision.[11] Thus, the Commission and Bureau found that the owners of the proposed North Atlantic and Pacific cables, by selling or leasing bulk capacity in their proposed systems, would not be engaged in common carrier activity. We make the same finding here regarding TTL's proposal.

9. Second, there does not appear to be a public interest reason to require that TTL's proposed facilities be provided on a common carrier basis. In applying the NARUC I test in its Transponder Sales decision, the Commission found that, due to the wide-scale availability of common carrier transponders and the likelihood that small users could finance the lease or purchase of non-common carrier transponders, it did not need to compel the continued offering of all transponders on a common carrier basis. When the Commission applied this test in granting cable landing licenses for provision of service via private fiber optic cables in the North Atlantic region, it found even less of a reason to require that those proposed cables be offered on a common carrier basis.[12] The Bureau subsequently made similar findings in authorizing the private cable in the Pacific region.[13] We make the same findings here for TTL. Common carriers currently operate three cables between the U.S. mainland and Hawaii: Haw-2,[14] Haw-3; and Haw-4. The Haw-3 cable interconnects with the TPC-2 cable system to extend services to and from Pacific region points.[15] The Haw-4 cable interconnects with TPC-3 to extend services to and from Pacific region points.[16] In addition, AT&T has indicated that it plans to construct and land a Haw-5 cable system between the U.S. mainland and Hawaii tentatively to begin operation in 1993.[17] These systems should be adequate to accommodate demand for common carrier cable service between the U.S. mainland and Hawaii for the conceivable future.[18] In addition, domestic satellite facilities are available for common carrier use between the U.S. mainland and Hawaii. In view of the facilities currently available for common carrier use and those that are planned to become available, we find no basis for requiring TTL to operate its proposed cable on a common carrier basis.

10. Further, we do not believe that authorization of TTL's proposed system for non-common carrier use would so substantially divert traffic from common carrier facilities as to impair the provision of service to the public. TTL is proposing to serve customers with bulk capacity or special service needs. These customers, typically private line users, as a group use only a small fraction of total telecommunications circuits. Some users may require satellite instead of cable facilities.

11. While there is no basis to require the proposed TTL cable to be operated on a common carrier basis, we do not at this time preclude its use by common carriers. Commission policy permits common carriers to purchase and use bulk capacity on private cable systems.[19] However, as the Commission stated in authorizing both the North Atlantic and the Pacific private cables, the Commission's policy is that a private system, such as TTL's proposed cable, shall succeed or fail on its own merits and not through Commission action that would guarantee common carrier use of the system.[20] Common carriers which desire to purchase and use bulk capacity on TTL's system would be required to apply for Title II authority prior to acquiring capacity and providing service over the system.[21] Should a carrier apply to use TTL circuits, we would have an opportunity to consider the potential effect of traffic diversion from existing or planned common carrier facilities in our normal facilities planning and authorization processes. If common carriers seek to divert major amounts of traffic from existing transmission facilities, we can at that time take all measures necessary to determine whether significant harm to common carriers which own and use existing facilities would occur and would be antithetical to the public interest.[22]

12. As the Commission found in its Private Submarine Cable decision, we need not look beyond the Cable Landing License Act in examining applications for licenses to land and operate cables for non-common carrier service. The Act provides in part that "no person shall land or operate in the United States any submarine cable directly or indirectly . . . connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States." 47 U.S.C. Section 34.

13. The TTL application contains the information required by Section 1.767 of the Commission's Rules. 47 C.F.R. Section 1.767. Section 1.767 requires an applica-

tion for a Cable Landing License to contain the following information: the name and address of the applicant; the corporate structure and citizenship of officers if the applicant is a corporation; a description of the submarine cable, including the type and number of channels and the capacity thereof; the location of points on the shore of the United States and in foreign countries where the cable will land (including a map); the proposed use, need, and desirability of the cable; and such other information as may be necessary to enable the Commission to act on the application. 47 C.F.R. Section 1.767(a). TTL has provided this information, as described above, except that it has not specified the precise location of the landing points of the proposed cable. TTL has informed us that the cable's western end would land in the island of Oahu in the State of Hawaii and the cable's eastern end would land in the west coast of the U.S. mainland. We find this information sufficient to satisfy the requirements of Section 1.767. To ensure compliance with the Commission's rules regarding the protection of the environment, 47 C.F.R. Section 1.1305, we require, as a condition of this license, that TTL inform us of the precise landing point locations on the west coast of the U.S. mainland and on the island of Oahu no less than 120 days prior to commencing construction of the cable landing stations at those locations.[23] We will then review the information provided to determine whether the proposed construction will have a significant impact on the environment within the meaning of Section 1.1307 of the Commission's Rules, 47 C.F.R. Section 1.1307, implementing the National Environment Policy Act of 1969, 42 U.S.C. Sections 4321-4335.

14. Finally, pursuant to our obligations under 47 U.S.C. Sections 34-39 and Executive Order No. 10530, May 11, 1954,[24] we have notified the Department of State of the TTL application. The State Department informs the Commission that it has no objection to the issuance of the Aloha cable landing license to TTL in the United States.[25]

15. Accordingly, in view of the above, we conclude that U.S. interests under the Cable Landing License Act can be assured through grant of a license to TTL as conditioned below.

16. Consistent with the foregoing, the Commission hereby GRANTS AND ISSUES, under the provisions of an Act entitled "An Act Relating to the Landing and Operation of Submarine Cables in the United States" (47 U.S.C. Sections 34-39) and Executive Order 10530, dated May 10, 1954 (delegating to the Federal Communications Commission certain presidential functions relating to submarine cable landing licenses), to Transnational Telecom, Ltd. a license to land and operate a high-capacity fiber optic digital submarine cable with at least two working fibers, each pair carrying a basic system module of 560 Mbps, associated regenerators and supervisory circuits, the western end of the cable landing at the island of Oahu in the State of Hawaii and the eastern end landing on the west coast of the U.S. mainland. Grant herein is subject to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39; subsequent applicable acts; all rules and regulations of the Federal Communications Commission made pursuant to authority vested in it; any treaties or conventions relating to communication to which the United States of America is or may hereafter become a party; any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view of protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) Neither this license nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(4) The Licensee shall notify the Commission in writing of the precise locations on the coast of the island of Oahu in the State of Hawaii and the west coast of the U.S. mainland at which the cable will land no less than 120 days prior to commencing construction of cable landing stations at those locations. The Commission reserves the right to require the Licensee to file an environmental impact statement should it determine that the landing of the cable at those locations and construction of necessary cable landing stations would have a significant impact upon the environment within the meaning of Sections 1.1305-1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4335. This license is subject to modification by the Commission upon its review of any environmental impact statement that it may require pursuant to its Rules;

(5) The Licensee or any persons or companies controlling it or controlled by it do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling it or controlled by it are parties;

(6) This license is subject to future modification which may be determined necessary by the Secretary of State to protect U.S. interests as a result of: (a) the sale or lease of capacity to particular foreign

or domestic entities; or (b) contracts awarded to particular foreign or domestic entities for the design, construction, installation, operation or maintenance of the proposed cable;

(7) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, or for failure to comply with the terms of the authorization; (8) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from such date, unless renewed or extended upon proper application duly filed no less than six months prior to the expiration date; and upon expiration of the license, all rights granted under it shall be terminated; and

(9) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this cable landing license.

17. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Tel-Optik, Ltd., 100 FCC 2d 1033, 1041 (1985) (hereinafter Private Submarine Cable decision). TTL agrees with the Commission's view that bulk users of broadband and high speed digital satellite circuits will be able to take advantage of cable to satisfy their transmission capacity needs and any special operational and technical requirements. *Id.*

[2] *Id.*

[3] TTL claims that the use of ISDN will become more widespread in the future as ISDN technology develops and improves and as ISDN standards emerge.

[4] TTL states that the role of digital PBXs in carrying voice and data over the same transmission facilities in all likelihood will expand to carrying voice, data, and video from work station to work station within a private national network. TTL claims that, as ISDN standards emerge, users will want to try to extend this service concept via Hawaii to international communications networks.

[5] Private Submarine Cable decision, 100 FCC 2d 1033.

[6] *Id.* The Bureau granted a final authorization in File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, Mimeo No. 4618 (released May 17, 1985).

[7] Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (Com. Car. Bur. 1987), *final authorization granted*, 4 FCC Rcd 8061 (1989).

[8] National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (hereinafter *NARUC I*).

[9] *NARUC I*, 525 F.2d at 642.

[10] *See* Domestic Fixed Transponder Sales (hereinafter Transponder Sales decision), 90 FCC 2d 1238, 1256-57 (1982), *aff'd sub nom.* World Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

[11] Private Submarine Cable decision, 100 FCC 2d at 1046-47; Pacific Telecom Cable, Inc., 2 FCC Rcd at 2687.

[12] Private Submarine Cable decision, 100 FCC 2d at 1046-1047. In this decision, the Commission also approved construction of a North Atlantic facility by Submarine Lightwave Cable Co. *See* Submarine Lightwave Cable Co., File No. S-C-L-85-001, *final authorization granted*, Mimeo No. 5241 (released June 19, 1985).

[13] Pacific Telecom Cable, Inc., *supra* note 7.

[14] The Commission currently has pending before it American Telephone and Telegraph Company's (AT&T) Application to deactivate and retire the California-Hawaii No. 2 Cable System (File No. I-T-D-90-003).

[15] AT&T, *et al.*, 43 FCC 2d 505 (1973) (Haw-3/TPC-4 decision).

[16] AT&T, *et al.*, File No. I-T-C-85-219, Mimeo No. 1794 (Com. Car. Bur. 1986) (Haw-4/TPC-3 decision).

[17] *See* AT&T Application for Authority Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Acquire, Activate and Operate Half-Interests in the HAW-4/TPC-3 Cable System, File No. I-T-C-89-136, at 4 (filed July 14, 1989).

[18] *Id.*

[19] Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables, 4 FCC Rcd 4454, 4455 (1989) (hereinafter *Clarification Order*). *See also* US Sprint Communications Company Limited Partnership, 4 FCC Rcd 6279 (Com. Car. Bur. 1989); CICI, Inc., *et al.*, 4 FCC Rcd 1022 (Com. Car. Bur. 1989).

[20] *See* Private Submarine Cable decision, 100 FCC 2d at 1051; Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 at note 15.

[21] Private Submarine Cable decision, 100 FCC 2d at 1048. *See also* International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985); Pacific Telecom Cable, Inc., 2 FCC Rcd at 2688.

[22] The Commission has held that carriers are not required to demonstrate in their applications that acquisition of capacity on a private cable will not cause economic harm to planned or existing common carrier operations. *Clarification Order*, 4 FCC Rcd at 4455. Rather, they must only provide the information which Commission Rules require to be contained in a Section 214 application. The Commission has stated that it has authority under its Section 214 public interest mandate to consider *sua sponte* any economic impact issues that may be raised by an application and to consider such issues when raised by a third party filing comments in response to the application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity would normally give rise to such issues. *Id.* at 4456. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact

issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.*

[23] The Commission placed the same condition on the applicants before granting final cable landing licenses to Tel-Optik, Ltd. (Tel-Optik), Submarine Lightwave Cable Company (SLC), *see* Private Submarine Cable decision, 100 FCC 2d at 1045, 1046, and Pacific Telecom Cable, Inc. (PTC), 2 FCC Rcd at 2688, 2689.

[24] By Executive Order No. 10530 (May 10, 1954), the Commission was delegated the responsibility of processing applications and issuing licenses pursuant to the Cable Landing License Act. This authority was conditioned upon the Commission's not granting or revoking licenses without first obtaining approval of the Secretary of State and any advice from any executive branch department or establishment of the Government as it may deem necessary.

[24] Letter from Randolph C. Earnest, Director, Office of Satellite and Cable Policy, Bureau of International Communications and Information Policy, United States Department of State, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (November 14, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DETROIT EDUCATIONAL TELEVISION FOUNDATION — CSG-89-172-ML

Application for authority to modify its license for a 10 and 9.3-meter fixed C-band transmit/receive earth station at Avon Township, Michigan (Call Sign WF67) for the provision of services between the United States and Canada and Mexico via all U.S. satellite systems, and the Anik and Morelos systems

ERRATUM

Released: January 30, 1990

By the Chief, International Facilities Division:

1. The Commission's Order, released on January 17, 1990 (DA 89-1684) in the above-captioned matter did not include reference to the two antennas licensed to Detroit Educational Television Foundation under Call Sign WF67. The Order is hereby corrected to include authority for transborder services via both the 10 and 9.3-meter antennas.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Kenny D. Hopkins File No. BP-870601AF

For a Construction Permit
for a New AM Station at
Cusetta, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 1990; Released: January 31, 1990

By the Commission:

1. The Commission has before it an Application for Review filed by Kenny D. Hopkins ("Hopkins") on July 11, 1988; an Opposition filed by Holy Ground Broadcasting, Inc. ("Holy Ground") on July 26, 1988; an engineering statement filed by Hopkins on April 7, 1989 which Hopkins intends to be associated with his application for review; a Motion to Strike the above engineering statement filed by Holy Ground on April 21, 1989; and a Petition to Deny that engineering statement filed by Holy Ground on May 5, 1989.

2. On June 1, 1987, Hopkins filed an application seeking a construction permit for a new AM station to operate on 700 kHz in Cusetta, GA (File No. BP-870601AF). This application was intended to be mutually exclusive with an application filed by Holy Ground to construct a new AM station to operate on 700 kHz in Dothan, AL (File No. BP-860909AA). Hopkins's application provided ground conductivity measurements taken from the nearby first adjacent channel, station WUFF(AM), Eastman, GA in an attempt to show required lack of overlap between Hopkins's proposed 0.5 mV/m contour and WUFF(AM)'s existing 0.5 mV/m contour. However, the Commission's preliminary study based on those measurements indicated there was such overlap in contravention of Section 73.37(a) of the Commission's Rules. The staff by letter dated December 3, 1987, returned Hopkins's application as unacceptable for filing, pursuant to Section 0.283 of the Commission's Rules. Further, the letter stated that in the event Hopkins's application was mutually exclusive with another application, Hopkins would be afforded one opportunity to obtain reacceptance *nunc pro tunc* to his original submission date by filing within 30 days of the date of the letter a request for reacceptance along with an amended application specifying a minor change.

3. On January 4, 1988, Hopkins resubmitted his application as a Petition for Reconsideration with a request that it be reaccepted *nunc pro tunc*. However, Hopkins's resubmitted application did not specify any minor change; rather, Hopkins submitted additional ground conductivity measurements taken from WUFF(AM) and contended that because there was no overlap to WUFF(AM) the Commission's return of the application was in error.

4. On February 8, 1988, Holy Ground filed a Petition to Deny this resubmitted application, arguing that even though additional ground conductivity measurements of radials 247^0, 257^0, 267^0 and 277^0 showed no overlap to WUFF(AM), the resubmitted ground conductivity measurement of the 255^0 radial still indicated prohibited overlap between the proposed 0.5 mV/m contour and WUFF(AM)'s 0.5 mV/m contour.

5. Hopkins and Holy Ground each filed additional pleadings arguing the effect to be given the measurement data submitted along the 255^0 radial as well as the effect to be given the measurement data submitted with the resubmitted application.

6. By letter dated June 3, 1988, the staff found that all pertinent measurement data, including the 255^0 radial, revealed that Hopkins's proposed 0.5 mV/m contour would overlap the 0.5 mV/m contour of first-adjacent channel station WUFF(AM), Eastman, GA in contravention of Section 73.37(a) of the Commission's Rules. The staff then denied Hopkins's Petition for Reconsideration and returned the application as unacceptable for filing. The petition to deny submitted by Holy Ground was dismissed as moot.

7. On July 11, 1988, Hopkins filed an application for review of the staff's action in its June 3, 1988 letter. Hopkins attached an engineering statement in support of its position that overlap does not exist. According to the engineering statement, this conclusion was based upon the measurements submitted in response to the Commission's letter of December 3, 1987. Hopkins noted that further measurements were being taken and contended that these measurements would reinforce his opinion that no overlap exists. The applicant further noted that he never modified his application because his position has been that there is no overlap; if the measurements currently being performed were to show overlap, Hopkins stated that the applicant would concede that the Commission is correct and modification would be promptly prepared. The applicant contended, however, that the public interest would not be served by such modification if the Commission were in error.

8. On July 26, 1988, Holy Ground filed an opposition to application for review. The opposition argued that Hopkins's application for review did not meet the criteria set forth in Section 1.115 of the Commission's Rules for review of a staff determination by the Commission. Holy Ground argued that since Hopkins did not demonstrate any error in the staff's determination his application for review should be denied. Holy Ground also contended that Hopkins's attempt to supply additional measurements or modify his proposal comes too late, as Hopkins was given prior opportunity to do both, and that delay in processing of Holy Ground's mutually exclusive application would result.

9. On April 7, 1989, Hopkins submitted an engineering statement intended to supplement his application for review. The statement acknowledged that a small overlap exists between Hopkins's proposed 0.5 mV/m contour and the existing 0.5 mV/m contour of WUFF(AM); however, Hopkins contended that "the overlapped area is insignificant in that the size of the area is *de minimis*." According to the statement, the total overlap area is 2.3 square kilometers which is under one percent of the area served by the proposed facility. Hopkins further argued that since the 16 houses located within this area were all "weekend retreats" as opposed to "legal residences," there

is no legal population within the overlap area and hence, "the overlap may be considered acceptable just as would be an overlap area in any other uninhabited region."

10. On April 21, 1989, Holy Ground filed a motion to strike the engineering statement contending that Hopkins's filing was almost a year late and violative of Section 1.115 of the Commission's Rules. Specifically, Holy Ground argues that Section 1.115(c) of the Commission's Rules provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." According to Holy Ground, "the Hopkins material was not presented to the Mass Media Bureau in a timely fashion at earlier stages of consideration of his application but rather is only now filed after the application is before the Commission through the Application for Review." Additionally, Holy Ground contends that this pleading violated Section 1.115(d) of the Commission's Rules which requires that an application for review and any supplement thereto shall be filed within 30 days from the date of public notice of such action. In this case, Holy Ground asserts that that deadline was July 11, 1988. Holy Ground further argues that were Hopkins's pleading to be treated as a reply it would violate Section 1.115 as untimely. Finally, Holy Ground argues that Hopkins's concession that overlap exists and his attempt to "amend" the application is also late.[1]

11. Section 1.115 of the Commission's Rules governs applications for review of actions taken pursuant to delegated authority. That section requires that such applications specify the factors which warrant Commission consideration of the questions presented. Hopkins's July 11, 1988 application for review argued that the staff made an erroneous finding as to the existence of overlap between Hopkins's proposed 0.5 mV/m contour and the 0.5 mV/m contour of first adjacent channel, WUFF(AM). However, Hopkins's own engineering statement filed on April 7, 1989 recognized the existence of such overlap, and thereby confirmed the staff's finding. Hence, Hopkins has failed to show that the staff erred in twice returning his application as unacceptable for filing and Hopkins's application for review cannot be granted on this basis.

12. Hopkins's engineering statement sought to raise *for the first time* the question whether the area of overlap was *de minimis*. Citing the size and population of the area involved, Hopkins contended that the "overlap may be considered acceptable." Section 1.115(c) of the Commission's Rules is explicit, however, in providing that no application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. In this case, the question whether the area of overlap between Hopkins's proposed 0.5 mV/m contour and WUFF(AM)'s 0.5 mV/m contour is *de minimis* was never presented to the staff. Hopkins was given an opportunity to discover the existence of such overlap when his application was first returned on December 3, 1987; any modification of Hopkins's proposal or any request for waiver of Section 73.37(a) should have been made when the application was resubmitted along with the request for reacceptance *nunc pro tunc* on January 4, 1988. Instead, Hopkins submitted additional ground conductivity measurements and argued that no overlap existed. Now, some 8 months after his application for review was filed,[2] and more than 15 months after his application for a construction permit was first returned as unacceptable for filing due to the existence of overlap, Hopkins concedes that overlap exists but requests that the overlap be treated as *de minimis*.

13. Examining Hopkins's *de minimis* argument at this stage of the proceeding would contravene the provisions of Section 1.115(c) of the Commission's Rules and undermine the public interest benefit in discouraging the filing of defective applications. *See Broadcast Stations (Defective AM and FM Applications)*, 56 RR 2d 776 (1984), *recon. denied*, 57 RR 2d 1603 (1985). To allow Hopkins to correct a defect more than a year after he was first put on notice of that fact by the Commission and allowed 30 days to correct that defect would unduly prejudice Holy Ground, an applicant who prepared a properly executed application, and would detract from the Commission's effort to eliminate delay in the processing of applications.

14. In view of the foregoing, IT IS ORDERED, That the above-captioned application for review IS DENIED and that Holy Ground's opposition to the application for review IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Holy Ground's petition to deny the engineering statement reiterates these arguments.

[2] Section 1.115(d) of the Commission's Rules requires that an application for review and any supplements thereto be filed within 30 days from the date of public notice of such action. In this case, that date was July 11, 1988; hence, Hopkins's engineering statement of April 7, 1989 was untimely.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

FRED R. MORTON, JR. File No. BPH-861110MA

ROBERT M. KERR File No. ARN-861113MA

For Construction Permit for a New
FM Station at Altus, Oklahoma on
Channel 300A

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1990; Released: January 31, 1990

By the Commission:

1. The Commission has under consideration: (l) a January 28, 1988 Application for Review filed by Robert M. Kerr ("Kerr"), of the December 28, 1987 denial by the Chief, Audio Services Division, of Kerr's Petition for Reconsideration of the December 10, 1986 staff return of Kerr's application as not acceptable for tender; (2) an Opposition to the Application for Review filed March 4, 1988, filed by Fred R. Morton, Jr. ("Morton");[1] (3) an April 22, 1988 Application for Review, also filed by Kerr of the March 22, 1988 staff denial of his December 30, 1986 Petition to Deny Morton's application; and (4) Morton's Opposition to the Application for Review, filed May 5, 1988.

2. *Background*. On December 10, 1986, the Bureau returned the application filed by Kerr for a new FM station at Altus, Oklahoma. The application was deemed not sufficient for tender because it lacked the certification of site availability required by paragraph 2(d) of Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985) ("MM Docket 84-750"). MM Docket 84-750 established the current FM "hard look" application processing procedures. On December 28, 1987, the Chief, Audio Services Division, denied Kerr's petition for reconsideration of that action. On March 22, 1988, the Chief, Audio Services Division, also denied Kerr's December 30, 1986 Petition to Deny an application filed by Morton for the same Altus allocation. Kerr's petition had objected to Morton's response of "Does Not Apply" to Question 8(b) of Section II of FCC Form 301 (1985 ed.), which calls for a "yes" or "no" answer regarding other broadcast interests.

3. Kerr's first Application for Review, filed January 28, 1988, claims that: (1) as an FM applicant who owns his proposed site, he was not given adequate notice that all applicants are required to file certifications of site availability with their applications; and (2) the Bureau acted illegally, and therefore inconsistently, in accepting Morton's mutually exclusive application, which failed to answer properly a multiple ownership question required by the application form.

4. Kerr's second Application for Review, filed April 22, 1988, is directed against the Bureau's denial of Kerr's Petition to Deny dated March 22, 1988 requesting the return of Morton's application. Kerr repeats his argument that Morton's failure to include, as required, either a "yes" or "no" answer to Question 8(b) of Section II of Form 301 (1985) precluded the application from being found "substantially complete" under the guidelines set forth in MM Docket 84-750 and therefore required the staff to find that the application was not acceptable for tender and to return the application. Since some arguments contained in both the first and second applications for review that are essentially the same, our discussion will treat the two applications for review as a consolidated and single request for relief.

5. *Discussion*. Kerr's application was returned as not acceptable for tender because it lacked the certification of site availability required by the *Report and Order* in Docket 84-750, which states at paragraph 2(d) Appendix D:

> d. Site availability. The Commission does not require of applicants absolute certainty of site availability, but rather reasonable assurance. An application specifying an unavailable site *per se* frustrates the Commission's stated goal of expeditious introduction of service. Such a filing requires an amendment specifying a site change before grant or a further application for construction-permit modification after grant. To avoid vacuous and sequential filings, the Commission has imposed a requirement of site-availability certification which includes the name and address of the site owner or his agent. Failure of an applicant to provide the requisite certification in the form set forth in Appendix B of the *Report and Order* in Docket 84-750, *supra*, will result in the application being deemed not substantially complete.

50 Fed. Reg. 19,936, 19,945 (May 13, 1985); *see also* 58 RR2d 166, 167 (1985) (reprint of Appendix D).

Appendix B to the *Report and Order*, the required certification of site availability, states, in pertinent part, as follows:

> 1. The applicant certifies that it has reasonable assurance in good faith that the site or structure proposed in Items 1 and/or 2, Section V-G, FCC Form 301, as the location of its transmitting antenna, will be available to the applicant for applicant's intended purpose.
>
> YES_____ NO_____ . . .
>
> 2. If reasonable assurance is not based on applicants' ownership of the proposed site or structure, applicant certifies that it has obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure. . .
>
> _____ _____
> Applicant's Signature Date

Id. at 19,944; *see also* 58 RR2d 776, 788 (reprint of Appendix B). Applicants were informed that prior to the availability of the new Form 301, "applicants should attach such certification to the old form." *Id.* at 19,940; *see also* 58 RR2d at 782.

6. Thus, in its *Report and Order* in MM Docket 84-750 the Commission required *every* applicant to include the certificate of site availability in its application. The certificate itself explicitly recognizes that applicants may own their own sites, and therefore it is unreasonable for any applicant to conclude that those who own their own site are exempted. Appendix B, Appendix D and related explanatory discussion were all published in the Federal Register; Kerr's claim of lack of notice is therefore without merit. Kerr nowhere represented in the application that he was the owner of the proposed site, nor did he submit the required certification of site availability. The absence of any such representation or certification thus precluded the application from being found to be "substantially complete" under the criteria set forth in the *Report and Order* in MM Docket 84-750, and therefore required the Bureau to return the Kerr application as unacceptable for tender. *See Ann D. Genther*, 1 FCC Rcd 399 (1986).

7. The Bureau was not inconsistent in its treatment and review of the mutually exclusive Morton application. The Commission outlined the manner in which applicants are to answer Items 6-8 of Section II, Form 301 in Appendix D of the *Report and Order* in MM Docket 84-750. 50 Fed. Reg. 19,936, 19,945; *see also* 58 RR 2d 166, 167 (1985). Therein, the Commission focused upon a "failure to respond" and stated that "leaving these questions unanswered" would amount to a tenderability defect since it "makes it impossible to begin a multiple ownership analysis." 50 Fed. Reg. at 19,945; 58 RR2d at 167. Morton's response to Question 8(b) of Section II, Form 301 concerning the broadcast interests of other members of his family did not leave the question unanswered. His response, while perhaps imperfect since the Form calls for a "yes" or "no" response, was deemed a negative answer by the Bureau.[2] Thus, the response did not delay the Bureau's ownership analysis of that particular application, which is the underlying Commission goal in requiring that this particular "hard look" tenderability element be present in every commercial FM application.

8. Accordingly, for the aforementioned reasons, IT IS ORDERED That, the applications for review filed January 28, 1988 and April 22, 1988, respectively, by Robert M. Kerr, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Morton's Opposition is accompanied by a motion to accept its late-filed pleading. Because Kerr did not serve a copy of the Application for Review on Morton, as required by Section 1.115(f), 47 C.F.R. § 1.115(f), Morton's request will be granted.

[2] In his opposition to Kerr's Application for Review, Morton confirmed that his response was intended as a negative answer.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v. File No. E-89-435

CENTRAL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: January 5, 1990; Released: January 30, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, Telesphere Network, Inc. ("Telesphere") filed the above-captioned formal complaint against Central Telephone Company (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against Telesphere during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint was due on November 27, 1989. An answer and motion to dismiss were duly filed. On December 11, 1989, however, Telesphere filed a motion for leave to withdraw its complaint, stating that it does not wish to pursue its claim against the Defendant and is seeking leave to withdraw its complaint with prejudice.

2. On the basis of the statements contained in the Motion, we conclude that there are no longer issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Telesphere's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-27

In the Matter of

Amendment of the Maritime Services Rules to permit both commercial and noncommercial communications on VHF channels 67 and 72 in the Puget Sound area — RM-6769

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1990; Released: February 1, 1990

By the Commission:

I. INTRODUCTION

1. The North Pacific Marine Radio Council (NPMRC) filed a petition for rule making (RM-6769) on April 27, 1989, Public Notice Report No. 1781 dated June 2, 1989. In its petition, the NPMRC asks the Commission to amend Section 80.373(f) of the rules, 47 C.F.R. § 80.373(f), to permit both commercial and noncommercial communications on very high frequency (VHF) channels 67 and 72 in the Puget Sound and the Strait of Juan de Fuca. This *Notice of Proposed Rule Making* (*Notice)* solicits comments on that proposal.

II. BACKGROUND

2. Section 80.373(f) of the Rules, 47 C.F.R. § 80.373(f), lists the VHF channels in the 156-162 MHz band for use by ships and private coast stations. There are currently thirteen channels for use by commercial vessels, three of which are for intership use only. There are currently six channels for use by noncommercial vessels, one of which is for intership use only. In a *Report and Order* in PR Docket No. 83-431, FCC 85-441, 50 FR 33942, (1985), we assigned channel 70 (156.525 MHz), which had previously been available for noncommercial use, for digital selective calling in accordance with international usage (RR No. 4681A). This action, while necessary, nevertheless exacerbated the shortage of noncommercial channels.

3. To provide some relief to noncommercial users we proposed in a *Notice of Proposed Rule Making* in PR Docket No. 88-350, 3 FCC Rcd 4288 (1988), to make VHF channels 79 and 80 available for noncommercial as well as commercial use on a nationwide basis. In light of the comments, however, we determined that nationwide sharing was not in the public interest because local conditions vary. Accordingly, we authorized sharing in that proceeding on VHF channels 79 and 80 in the Great Lakes area only, the original area requested by the petitioner. We indicated, however, that we would consider sharing in other areas on a case-by-case basis.[1]

III. DISCUSSION

4. In support of its request, NPMRC notes the growing number of vessels in the area. NPMRC argues that as the number grows the ability to communicate between ships becomes important.[2] Under the current rules, however, there is only one VHF channel (channel 9) that can be used by both commercial and noncommercial vessels in the Puget Sound area. NPMRC states that this frequency is heavily used by commercial vessels. NPMRC proposes to allow both commercial and noncommercial communications on channel 67, currently restricted to commercial intership communications, and channel 72, currently restricted to noncommercial intership communications. This, it argues, would provide three channels for both commercial and noncommercial intership communications to be used by vessels operating in Northwest Washington waters. NPMRC points out that such channel usage is consistent with channel usage in adjacent Canadian waters that vessels in the area routinely navigate. NPMRC states that it has discussed its proposal with marine radio users and government officials in the Puget Sound area and in Canada and they have been supportive of the idea.

5. As indicated in PR Docket 88-350, we support regional sharing of commercial/noncommercial VHF marine channels where feasible. In this case, allowing both commercial and noncommercial vessels to use these two channels should increase boating safety in the area. Further, such sharing is supported by the marine radio users in the area and the channel usage is consistent with channel usage in adjacent Canadian waters.

6. Accordingly, we propose to amend Section 80.373(f) of the Rules to permit channels 67 and 72 each to be used for both commercial and noncommercial intership communications in the Puget Sound and the Strait of Juan de Fuca. The proposed amendments are issued under the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

IV. PROCEDURAL MATTERS

7. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase burden hours imposed on the public.

8. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rule making proceeding because, if promulgated, it will not have a significant economic impact on a substantial number of small entities. The proposed rule would allow both commercial and noncommercial intership communications on two additional channels in the Puget Sound area. This usage should not substantially affect vessels operating in this area. The rule change would ease communications in the area by allowing vessels to operate in the same manner they can now operate in adjacent Canadian waters.

9. For purposes of this non-restricted notice and comment rule making proceeding, member of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a

public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

10. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. 1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of the same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

11. Under procedures set out in Section 1.415 of the Rules and Regulations, 47 C.F.R. § 1.415, interested persons may file comments on or before **March 23, 1990** and reply comments on or before **April 9, 1990.** All relevant and timerly comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order.*

12. In accordance with the provision of Section 1.419 of the Rules and Regulations, 47 C.F.R. § 1.419, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 9 copies. Members of the general public who wish to express their comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room (Room 239) at its headquarters in Washington, D.C.

13. IT IS ORDERED that a copy of this *Notice* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - Stations in the Maritime Services

1. AUTHORITY: Secs. 4, 303 48 Stat. 1066, as amended, 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In § 80.373, paragraph (f) is revised by adding a new frequency to the commercial and noncommercial tables and adding a new footnote to read as follows:

§ 80.373 Private communications frequencies

* * * * *

(f) * * *

* * * * *

Commercial

01[1] . . .	156.050	156.050
63[1] . . .	156.175	156.175
07 . . .	156.350	156.350
67[7] . . .	156.375	. . . Intership only
08 . . .	156.400	. . . Intership only
09 . . .	156.450	156.450
10 . . .	156.500	156.500
11[3] . . .	156.550	156.550
72[13] . . .	156.625	. . . Intership only
18 . . .	156.900	156.900
19 . . .	156.950	156.950
79 . . .	156.975	156.975
80 . . .	157.025	157.025
88[8] . . .	157.425	. . . Intership only

* * * * *

Noncommercial

67[13] . . .	156.375	. . . Intership only
68 . . .	156.425	156.425
09 . . .	156.450	156.450
69 . . .	156.475	156.475
71 . . .	156.575	156.575
72 . . .	156.625	. . . Intership only
78 . . .	156.925	156.925
79 . . .	156.975	156.975 Great Lakes only
80 . . .	157.025	157.025 Great Lakes only

* * * * *

[13] Available only in the Puget Sound and the Strait of Juan de Fuca.

* * * * *

FOOTNOTES

[1] *Report and Order*, PR Docket No. 88-350, 4 FCC Rcd 1637 (1989).

[2] For example, sailboats must frequently talk to commercial vessels during races. Vessels also routinely exchange information on weather and sea conditions.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-527

In the Matter of	RM-6274
Amendment of the Amateur Service	RM-6275
Rules to Expand the 6 Meter	
Repeater Subband.	

REPORT AND ORDER

Adopted: January 22, 1990; Released: February 1, 1990

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends the Amateur Service Rules (Part 97) by expanding the 6 meter repeater subband from 52-54 MHz to 51-54 MHz. Such expansion will permit operation of additional repeaters to meet the increased demand for such operation.

II. BACKGROUND

2. On October 31, 1988, we adopted a *Notice of Proposed Rule Making* (*Notice*) [1] in the above-captioned proceeding. The *Notice* proposed to expand the amateur service 6 meter repeater subband (52-54 MHz) by one megahertz, thereby encompassing frequencies between 51-54 MHz. The proposal responded to requests for such expansion from The Southern California Six Meter Club (SCSMC) and The Southern California Repeater and Remote Base Association (SCRRBA). In the *Notice*, we stated that there appeared to be a strong demand within the amateur community for the expansion of the 6 meter repeater subband, but pointed out that the ARRL's 6 meter band plan recommends that the frequency segment 51.1-52.0 MHz be utilized for simplex F3E emission voice transmissions. We also called attention to the segment 51.0-51.1 MHz which the ARRL band plan designates as the "Pacific DX Window" (DX window), a frequency segment in the 6 meter band where amateur stations in International Telecommunication Union Regions 2 and 3 can intercommunicate during certain conditions of radio frequency propagation. The comments discussed below address these and other matters.

III. COMMENTS

3. In response to the proposal, we received thirteen comments and one reply comment.[2] A majority of the commenters supported the proposed expansion of the 6 meter subband. The ARRL, for example, favors the proposal even though it does not conform with the present ARRL 6 meter band plan. The ARRL states that its band plan would be revised so that operations now conducted in the 51-52 MHz expansion segment would be adequately protected from repeater operation. [3] The SCDCC and SCRRBA support the proposed expansion because it would provide channels for new repeaters.[4] Mark Weiss states that nationwide standardization in the use of the 6 meter repeater subband pursuant to an ARRL band plan would encourage manufacturers to produce equipment for the band.[5]

4. George Bednekoff, James F. Epley, Jr. and William Gardner oppose the proposal. Mr. Bednekoff questions whether there is a shortage of 6 meter band repeater channels. He also notes that current transceivers would not be suitable for use in an expanded repeater segment because they have only a one megahertz separation between the transmitting and receiving channels. Further, he believes that communications in the DX window would experience interference from local repeater operation.[6] Mr. Epley believes that the 51-52 MHz segment should be reserved for packet radio, television, satellite, and communications with European stations.[7] Mr. Gardner contends that expansion of the 6 meter repeater subband would result in interference to Japanese amateur stations and there would be an increase in interference between repeaters. He also states that expanding the repeater subband would make equipment designed for the current subband obsolete.[8]

IV. DISCUSSION

5. There was general support in the comments for an expansion of the 6 meter subband. We believe that a need for expansion has been shown and that other types of communications can be accommodated in the remaining one megahertz segment (50-51 MHz) where repeater operation is prohibited. The ARRL concurs with those commenters who are concerned about interference to stations operating in the DX window. It said that it is cognizant of the need to protect those operations and will further such protection through vigorous efforts to revise the voluntary band plan for the 6 meter band. The ARRL believes that expansion of the 6 meter repeater subband is desirable and can be accommodated on a planned, coordinated basis within the amateur service.[9] Based on the ARRL's assurance of revised voluntary band plans, we are confident that the other uses in the 6 meter band will be protected.

6. We have noted the comments that concern interference to non-repeater operations. We conclude from the comments that in some areas, at least, such operations can continue undisturbed within the 51-52 MHz segment. In other areas, such operations may have to relocate to the 50-51 MHz segment. We are persuaded that any resulting relocation inconvenience will be slight and not a sufficient reason to preclude the expansion. With respect to the comments stating that transceivers designed for the current two megahertz repeater segment are unsuitable for a three megahertz repeater segment, we do not believe that this is a significant deterrent to authorizing the expansion. Any necessary modification of such a transceiver should be within the capability of an amateur operator.

V. CONCLUSION

7. In summary, we believe that the public interest will be served by amending the amateur service rules to expand the 6 meter band repeater subband to 51-54 MHz. It will allow additional repeaters to operate. We are con-

fident that voluntary band plans will assure that weak-signal communications in the DX window and other amateur service uses will be adequately protected.

VI. REGULATORY FLEXIBILITY ACT

8. Pursuant to Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities, because these entities may not use the amateur radio services for commercial radiocommunications.

VII. PAPERWORK REDUCTION ACT

9. The rule adopted herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C § 3501 *et seq.*, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

VIII. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that effective **April 9, 1990,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth below. Authority for this action is found in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(c) and (r).

11. IT IS FURTHER ORDERED that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

12. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U. S. C. §§ 154, 303. Interpret or apply 48 Stat. 1064 - 1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.205(b) is revised to read as follows:

§ 97.205 Repeater station.

* * * * *

(b) A repeater may receive and retransmit only on the 10 m and shorter wavelength frequency bands except the 28.0-29.5 MHz, 50.0-51.0 MHz, 144.0-144.5 MHz, 145.5-146.0 MHz, 220.0-220.5 MHz, 431.0-433.0 MHz and 435.0-438.0 MHz segments.

* * * * *

FOOTNOTES

[1] 3 FCC Rcd 6606 (1988).

[2] George Bednekoff, James F. Epley, Jr., William R. Gardner, Orange County, Southern California Digital Communications Council (SCDCC), SCRRBA, SCSMC, The American Radio Relay League, Inc. (ARRL), James Robinson, and Mark Weiss filed timely comments. Francis Ladd, the Los Angeles Repeater Association (LARA), and the Six Meter International Radio Klub (SMIRK) filed comments that were received after the comment period closed, but before the close of the reply comment period. The ARRL filed the only reply comment.

[3] Comments of ARRL at 2 and 3.

[4] Comments of SCDCC at 1; comments of SCRRBA at 2.

[5] Comments of Mark Weiss to RM-6275 at 4, incoporated by reference in comments of Mark Weiss filed in response to the *Notice*.

[6] Comments of George Bednekoff at 1.

[7] Comments of James Epley, Jr. at 1.

[8] Comments of William Gardner at 1.

[9] Reply comments of ARRL at 2 and 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

CITY OF PALM DESERT, CALIFORNIA — CSR-3040, CA0058
Palm Desert, California

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 1990; Released: February 1, 1990

By the Chief, Mass Media Bureau:

1. On February 24, 1989, the City of Palm Desert, California filed a "Petition for Reconsideration" of the decision by the Chief of the Commission's Video Services Division in the case of the *City of Palm Desert, California*, 3 FCC Rcd 7133 (1988). Palmer Communications, Inc. now d/b/a Palmer CableVision (previously d/b/a Coachella Valley Television), operator of a system serving Palm Desert, filed a motion to dismiss the petition on March 6, 1989, which the City opposed on March 20, 1989. Thereafter, Palmer CableVision filed a reply to the City's pleading on March 30, 1989, as well as a supplement to its motion to dismiss, along with a petition to accept the late filing on June 15, 1989.

2. In the initial decision in the *City of Palm Desert, California, supra*, the City's request for waiver of §76.33(a)(2) of the Commission's Rules to enable it to regulate rates for basic cable service was denied since it was found that there was effective competition in the community as a result of Grade B or better service from two stations licensed to Palm Springs, California, KMIR-TV (NBC) and KESQ-TV (ABC), as well as service from a local translator station also licensed to Palmer Communications, Inc., K55FI, which rebroadcasts Station KCBS-TV(CBS) Los Angeles, California.[1] In its petition for reconsideration, the City noted certain errors in the geographical coordinates provided to the Commission by Palmer for the translator station and concluded that the theoretical protected contour of K55FI would not actually cover all of Palm Desert, as had previously been found by the Commission's staff. The City submitted an analysis by their consulting engineer, Hammett & Edison, Inc., in support of this contention. This analysis also indicated that earlier field strength measurements of K55FI'S signal in Palm Desert on July 12, 1988, by Palmer had shown a maximum field strength of 52.1 dBu and a mean field strength of 46.6 dBu, and that when these figures are properly corrected for the amount of cable used and other variables, these measurements actually convert to a maximum value of 67.2 dBu and a mean value of 61.7 dBu. They argue that since the protected contour specified by §74.707(a)(1) of the Commission's Rules is 74 dBu for UHF television translator stations, K55FI fails to meet this standard ". . . whether based upon measured field strength values or upon a theoretical calculation. . . ."

3. In response, Palmer CableVision admits that the coordinates submitted for K55FI were in error, but it states that the error was unintentional, that it filed a request for special temporary authority on February 2, 1989, and that it intends to correct its error and to file a modification application.[2] Meanwhile, it notes that the City has failed to meet its burden of proof since it did not take any measurements of the signal of K55FI or of other translator stations licensed to nearby communities such as Palm Springs (including K66BM, K20CB, K53CK). Furthermore, Palmer CableVision argues that Station KSCI (Ind., Channel 18) San Bernardino, California, also places a predicted Grade B contour over Palm Desert, and that several other Los Angeles, California stations, including KNBC-TV and KCBS-TV, ". . . were receivable with Grade B signal quality at locations in Palm Desert." Moreover, despite previous assurances to the Commission that the City would submit Arbitron survey data of significantly viewed signals in Palm Desert by July 1, 1987, no such data was submitted. Furthermore according to Palmer, the measurements made July 12, 1988, were prepared by a cable technician and were only of a preliminary nature ". . . in connection with activation of the translator station." Palmer states that it never intended these measurements to be used as part of the record in this proceeding. Finally, Palmer submits an engineering showing prepared by James W. Hart of Hartech, Inc. demonstrating that the field strength of the signal of K55FI was greater than 74 dBu at 38 of the 41 locations, or 93 percent, measured in Palm Desert on May 6 and May 7, 1989.

4. Staff review of the most recent data based upon actual field strength measurements submitted by Palmer confirms its contention that translator station K55FI in fact does serve Palm Desert, California within the guidelines specified by §76.33(a)(3) of the Commission's Rules.[3] Since there has never been any doubt raised concerning the Grade B or better service in Palm Desert provided by Stations KMIR-TV and KESQ-TV, we find that the effective competition standard established by §76.33 of the Rules is met in the City of Palm Desert, and the "Petition for Reconsideration" of our initial decision will be denied.

5. In view of the foregoing, we find pursuant to §0.283 of the Commission's Rules, that grant of Palm Desert's petition for reconsideration is not in the public interest.

6. Accordingly, IT IS ORDERED, that the "Petition for Reconsideration" filed February 24, 1989, by the City of Palm Desert, California IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] According to §76.33(a)(2) of the Commission's Rules, cable systems are subject to local regulation of basic subscriber rates only in the absence of effective competition, which is defined as follows:

A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in §73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in §76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station authorized to serve the cable community is to be counted in the same manner as a full-service station, except that its coverage area shall be based on its protected contour as specified in §74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B countour or significantly viewed signal within the cable community.

[2] This filing was submitted to the Commission on March 9, 1989, and the license was granted on November 17, 1989.

[3] None of the prior measurements submitted, however, satisfy these guidelines.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-15

In the Matter of

Amendment of Section 73.202(b), RM-7038
Table of Allotments,
FM Broadcast Stations.
(Benton, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 12, 1990; Released: February 1, 1990

By the Chief, Allocations Branch:

1. Lanmar Broadcasting, Inc. (petitioner), licensee of Station WQRL(FM), Channel 292A, Benton, Illinois, has filed a petition for rule making requesting the substitution of Channel 292B1 for Channel 292A at Benton, Illinois, and modification of its license for Station WQRL(FM) to specify the higher powered channel. Petitioner states is intention to apply for the channel, if allotted.

2. Channel 292B1 can be allotted to Benton in compliance with the Commission's minimum distance separation requirements with a site restriction of 22 kilometers (13.6 miles) southeast of the community.[1]

3. As requested, we shall also propose to modify the license of Station WQRL(FM) to specify operation on Channel 292B1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Benton or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the fact that Benton could receive its first wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Benton, Illinois	292A	292B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Tom Land
Lanmar Broadcasting, Inc.
P. O. Box 310
Fairfield, Illinois 62837

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 37-57-05 and West Longitude 88-40-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-14

In the Matter of

Amendment of Section 73.202(b), RM-7193
Table of Allotments,
FM Broadcast Stations.
(Eldorado and Lawton, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1990; Released: February 1, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Communicorp, Inc. (petitioner), licensee of Station KQLI(FM), Channel 232A, Lawton, Oklahoma. Petitioner requests the substitution of Channel 232C3 for Channel 232A at Lawton and the modification of its license for Station KQLI accordingly. In order to accomplish the upgrading of its station, petitioner further requests the substitution of Channel 246A for unoccupied and unapplied for Channel 232A at Eldorado, Oklahoma. Alternatively, it requests that either Channel 246A, 234A or 233A be substituted for Channel 232A at Eldorado so as to enable the petitioner to operate Station KQLI as a Class A station with 6 kilowatts of power.

2. Petitioner states that Channel 232C3 can be allotted to Eldorado in compliance with the Commission's minimum distance separation requirements now that: (1) Station KSEY(FM), Seymour, Texas, has been authorized to operate on Channel 230C2 (BPH-880208ID); (2) the application of Station KDGE(FM), Gainesville, Texas, to move its transmitter (BPH-870904ID) has been approved; and (3) the construction permit for Station KICZ(FM), Channel 232A, Elk City, Oklahoma, expired on November 5, 1988, with no request for an extension of time having been filed.[1]

3. We have determined that Channel 232C3 cannot be allotted to Lawton in compliance with the Commission's minimum distance separation requirements. Even if the construction permit of Station KICZ has expired, petitioner is still required to protect the Channel 232A allotment at Elk City since its petition does not include a request for the deletion of the channel. Based on this finding, we are unable to arrive at a site restriction which would enable Station KQLI to provide the requisite 70 dBu signal to all of Lawton while also complying with the minimum distance separation requirements to both Station KDGE at Gainesville and Station KICZ at Elk City. However, we have confirmed that Station KQLI can upgrade its present operation to 6 kilowatts if Channel 232A is deleted from Eldorado. Therefore, we will propose that Channel 246A be substituted for unoccupied and unapplied for Channel 232A at Eldorado. Channel 246A can be allotted to Eldorado in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

4. We believe the public interest would be served by proposing the substitution of Channel 246A for Channel 232A at Eldorado, Oklahoma, since it could enable Station KQLI at Lawton, Oklahoma, to increase its operation to 6 kilowatts and thus expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Eldorado, Oklahoma	232A	246A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Colby M. May, Esq.
May & Dunne, Chartered
1000 Thomas Jefferson Street, N.W., Suite 520
Washington, D.C. 20007
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Commission has before it the application of Franklin Broadcasting to assign Station KICZ's construction permit to Keystone Communications, Inc. (BAPH-880203HT), filed February 3, 1988.

[2] The coordinates for Channel 246A at Eldorado are North Latitude 34-28-24 and West Longitude 99-38-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-361

In the Matter of

Amendment of Section 73.202(b), RM-6718
Table of Allotments,
FM Broadcast Stations.
(Beulah, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 19, 1990; Released: February 1, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6469 (1989), issued in response to a petition filed by Roger L. Hoppe II (petitioner). The *Notice* proposed the allotment of FM Channel 221A to Beulah, Michigan, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated his intention to apply for the channel. No other comments were received.

2. Channel 221A can be allotted to Beulah, Michigan, in compliance with the minimum distance separation requirements of Section 73.207 of the Commissions's Rules without a site restriction.[1] The license for Station WCCW-FM, Channel 221A, Traverse City, Michigan, was modified effective August 12, 1988, to specify operation on Channel 298A, which removed the conflict between Beulah and Traverse City.[2] Since the allotment of Channel 221A to Beulah is within 320 kilometers (200 miles) of the U.S.- Canadian border, concurrence of the Canadian government has been obtained.

3. In view of the fact that the proposed allotment could provide Beulah with its first FM broadcast service, we believe the public interest would be served by a grant of the petitioner's request.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 19, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Beulah, Michigan	221A

5. The window period for filing applications will open on **March 20, 1990,** and close on **April 19, 1990.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 221A are 44-37-36 and 86-05-54.

[2] A *Report & Order* in MM Docket 88-620 was adopted on November 7, 1989, modifying the license for Station WCCW-FM, from Channel 298A to Channel 298C2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-23

In the Matter of

Amendment of Section 73.202(b), RM-7150
Table of Allotments,
FM Broadcast Stations.
(Buckhannon, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 19, 1990; Released: February 1, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Harlynn, Inc. (petitioner)[1], seeking the substitution of Channel 228B1 for Channel 228A at Buckhannon, West Virginia, and the modification of the license for Station WBTQ(FM) at Buckhannon to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Our engineering analysis reveals that Channel 228B1 can be allotted to Buckhannon consistent with the Commission's minimum distance separation requirements at the site specified by the petitioner.[2] However, this proposal is contingent upon Station WSGM(FM), Staunton, Virginia, receiving an authorization to operate on Channel 226A in lieu of Channel 228A in accordance with *Woodstock, Virginia, et al*, 54 FR 33901, August 17, 1989. Therefore, we shall delay final action herein until the change has been made at Staunton.

3. Since Buckhannon is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules.

4. As requested, we shall propose to modify the license for Station WBTQ(FM) at Buckhannon to specify operation on Channel 228B1. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest in the higher class channel at Buckhannon nor require that the petitioner demonstrate the availability of an additional equivalent channel at that community.

5. In view of the fact that Buckhannon, West Virginia, could receive an expanded FM broadcast service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Buckhannon, West Virginia	228A, 267B	228B1, 267B

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Timothy E. Welch, Esq.
Dean George Hill, P.C.
1330 New Hampshire Ave., N.W. #113
Washington, D. C. 20036
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Initially, Cat Radio, Inc., then the licensee of Station WBTQ(FM) at Buckhannon, joined the petitioner in filing this petition for rule making pursuant to Section 73.3517. However, the license for Station WBTQ(FM) was recently assigned to the petitioner from Cat Radio, Inc., and the assignment has been consummated. *See* BALH-890810GM.

[2] The coordinates are 38-53-55 and 80-08-22, located at a site 13 kilometers (8.1 miles) southeast of Buckhannon.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-22

In the Matter of

Amendment of Section 73.202(b), RM-7194
Table of Allotments,
FM Broadcast Stations.
(Obion, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 19, 1990; Released: February 1, 1990

By the Chief, Allocations Branch:

1. At the request of Billy Gene Presson (petitioner), the Commission considers herein a petition for rule making seeking the allotment of Channel 267C3 to Obion, Tennessee, as that community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 267C3 can be allotted to Obion in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.4 kilometers (9 miles) northwest of the city.[1] The site restriction is necessary in order to avoid a short spacing to vacant but applied for Channel 268A at Jackson, Tennessee.

3. In view of the fact that Obion, Tennessee, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Obion, Tennessee	---	267C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John A. Borsari, Esq.
Borsari & Kump
900 Seventeenth Street, N.W.
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 36-20-42 and 89-19-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-21

In the Matter of

Amendment of Section 73.202(b), RM-7126
Table of Allotments,
FM Broadcast Stations.
(Beaumont, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1990; Released: February 1, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Eastland Broadcasting Corp. (petitioner) seeking the allotment of FM Channel 265A to Beaumont, California, as that community's first local broadcast service. Petitioner stated its intention to apply for the channel if allotted.

2. A staff engineering review has determined that Channel 265A can be allotted to Beaumont consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules,[1] contingent upon the grant of a license to cover the construction permit issued to Station KPSI-FM, Channel 263B1, Palm Springs, California.[2] In view of the contingency, this proceeding will not be finalized until the Palm Springs license is issued.

3. In view of the fact that Beaumont could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Beaumont, California	–	265A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William E. Kennard, Esq.
Verner, Liipfert, Bernhard,
McPherson and Hand
1660 L Street, N.W.
Suite 1000
Washington, DC 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates for this proposal are 33-56-06 and 116-58-24.

[2] Coordinates at the site specified in the construction permit issued to Station KPSI-FM are 33-56-53 and 116-24-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-325

In the Matter of

Amendment of Section 73.202(b), RM-6719
Table of Allotments,
FM Broadcast Stations.
Caro, Michigan

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 19, 1990; Released: February 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5957 (1989), issued in response to a petition filed by Prime Time Radio, Inc. (petitioner), proposing the substitution of FM Channel 221A for 285A at Caro, Michigan. Petitioner also requested modification of its license for Station WIDL to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in Channel 221A. No other comments were received.

2. As stated in the *Notice*, petitioner requested the substitution of channels because Station WIDL is operating from a site that is short spaced by two kilometers to Station WFYC-FM, Alma, Michigan. The substitution at Caro will eliminate the existing grandfathered short spacing at Alma. According to petitioner, permitting Station WIDL to change channels will enable the station to provide greater coverage to the Caro area. We believe the public interest would be served by the substitution of channels in order to alleviate the short spacing. Channel 221A can be allotted to Caro at the petitioner's specified coordinates.[1] Canadian concurrence has been obtained for this allotment since Caro is located within 320 kilometers (200 miles) of the U.S.- Canadian border. We shall modify the license of Station WIDL, Caro, to specify Channel 221A in accordance with Section 1.420(g) of the Commission's Rules since no other expressions of interest have been received.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 19, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Caro, Michigan	221A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WIDL, Caro, Michigan, IS MODIFIED TO SPECIFY operation on Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-6433 except the channel as specified above. Any other changes except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301)

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-6433, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 221A are 43-28-51 and 83-20-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-20

In the Matter of

Amendment of Section 73.202(b), RM-7124
Table of Allotments,
FM Broadcast Stations.
(Marina, Salinas and Seaside,
California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1990; Released: February 2, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Model Associates, Inc. (petitioner), licensee of Station KBOQ(FM), Channel 224A, Marina, California, requesting the substitution of Channel 224B1 for Channel 224A at Marina, and modification of the license for Station KBOQ(FM) to specify operation on the higher powered channel. In order to accommodate the request in conformity with the Commission's minimum distance separation requirements, petitioner seeks two additional changes to the FM Table of Allotments: (1) substitute Channel 280A for Channel 278A at Seaside, California, an allotment for which fifteen applications are pending;[1] and (2) substitute Channel 278A for Channel 280A at Salinas, California, and modify the license of Station KRAY-FM accordingly.

2. In support of the proposal, petitioner states that the requested substitution at Marina would enable Station KBOQ(FM) to provide enhanced service to Marina and the surrounding areas.[2] Moreover, petitioner advises that the present 4.7 kilometer southwest [3] site restriction on Channel 278A at Seaside renders that frequency technically inferior to the requested substitution of Channel 280A. Specifically, petitioner asserts that the site restriction, in tandem with the principal city coverage requirements of Section 73.315(a) of the Commission's Rules, does not provide any of the Seaside applicants with a satisfactory transmitter site. In fact, petitioner advises that at least five of the fifteen Seaside applicants have specified a site requiring a waiver of Section 73.315(a). Conversely, petitioner states that Channel 280A can be allotted consistent with Section 73.207(b) of the Commission's Rules, without a site restriction, thus enabling all applicants to specify a site from the area's primary electronics location, identified as the Hidden Hills Communications site. Petitioner adds that the Seaside substitution would obviate a need for the noted waiver requests. In support of the Salinas substitution, petitioner advocates that Station KRAY-FM will be able to relocate its transmitter to an area that will permit it to operate with full Class A facilities,[4] thereby increasing its primary service area from 573 square kilometers to 2,695 square kilometers. Petitioner advises that it will reimburse KCTY AM and KRAY FM, Inc., licensee of Station KRAY-FM, for its reasonable and prudent expenses related to the frequency change and transmitter relocation.[5]

3. A staff engineering analysis reveals that Channel 224B1 can be substituted for Channel 224A at Marina at the site specified in petitioner's application (BPH-890922IC) to relocate the transmitter for Station KBOQ(FM) 15.1 kilometers (9.4 miles) south[6] of the community. Channel 278A can be substituted for Channel 280A at Salinas, California, at the site specified by KRAY FM, Inc.[7] Further, we have determined that Channel 280A can be substituted for Channel 278A at Seaside without the imposition of a site restriction.[8]

4. Since the modification requests at Marina and Salinas, California, conform with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KBOQ(FM) and Station KRAY-FM, respectively, without entertaining other expressions of interest.

5. Although an *Order to Show Cause* to Station KRAY-FM is not required in view of its consent to the petitioner's modification request, we will serve it with a copy of this *Notice*. We will also serve a copy of this *Notice* on the applicants for Channel 278A at Seaside. In the event this proceeding is finalized prior to the issuance of a permit for Channel 278A at Seaside, the applicants may amend their applications accordingly. This may be accomplished without loss of "cut-off" status since the channels are of an equivalent class. *See, Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985) and *Sanibel, FL*, 50 FR 32706 (1985).

6. In view of the above, we consider it appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Marina, California	224A	224B1
Salinas, California	250A,264B, 273B,280A	250A,264B, 273B,278A
Seaside, California	278A,296B1	280A,296B1

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of the *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to KCTY AM & KRAY FM, Inc., P.O. Box 1939, Salinas, CA 93902, and to the applicants for Channel 278A at Seaside, California, as follows: The Dunlin Group, 1141 Fremont Boulevard, Seaside, CA 93955; Seaside Wireless, Ltd., 14524 Maplewood St., Poway, CA 92064; Coastal Broadcasting Company, 8007 River Place, Carmel, CA 93923; Communications West, Inc., 1500 Glenwood Avenue, Oklahoma City, OK 73116; Threshold Communications, 1656 N. California Blvd., Walnut Creek, CA 94596; Catherine Oda Grodzins, 375 Sage Lane, Soquel, CA 95073; Cap Limited Partnership, 40 Springpoint Road, Castroville, CA 95012; H. H. & L. Communications, 390 Elm Street, Seaside, CA 93955; Jerry J. Collins, P.O. Box 223192, Carmel, CA 93923; Quadramedia, Inc., 630 Palm Avenue, Seaside, CA 93955; Golden State Broadcasters, 1425 River Park Drive, Sacramento, CA 95815; Barbara S. Greenstein, 11401 Rouen Dr., Potomac, MD 20854;

Clintell Porter, 1712 Harding Street, Seaside, CA 93955; Seaside Rainbow Broadcasting Co., 1609 Luzern Street, Seaside, CA 93955; and Seaside Valley Service Radio, L.P., 65 Elmwood Drive, Walnut Creek, CA 94596.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Alfred C. Cordon, Esq.
Dennis J. Kelly, Esq.
Cordon and Kelly
Second Floor
1920 N Street, N.W.
Washington, DC 20036

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The applicants at Seaside are The Dunlin Group (BPH-880629MC), Seaside Wireless, Ltd (BPH-880701MF), Coastal Broadcasting Company (BPH-880801MH), Communications West, Inc. (BPH-880701MI), Threshold Communications (BPH-880701MJ), Catherine Oda Grodzins (BPH-880701MK), Cap Limited Partnership (BPH-880701ML), H.H.& L. Communications (BPH-880701MM), Jerry J. Collins (BPH-880701MN), Quadramedia, Inc. (BPH-880701MO), Golden State Broadcasters (BPH-880701MP), Barbara S. Greenstein (BPH-880701MR), Clintell Porter (BPH-880701MS), Seaside Rainbow Broadcasting Co. (BPH-880701MU), and Seaside Valley Service Radio, L.P. (BPH-880701MV).

[2] Specifically, petitioner's engineering statement indicates that modification to Channel 224B1 would enable Station KBOQ(FM) to increase its service area from 1,881 square kilometers to approximately 4,681 square kilometers.

[3] Coordinates for Channel 278A at Seaside are 36-34-45 and 121-52-05.

[4] Petitioner advises that although KRAY-FM presently operates with 3.0 kW, its height above average terrain is -41 meters. Although KRAY has attempted to locate a site from which it could operate Station KRAY-FM on Channel 280A at full operating values (*i.e.*, 3 kW at 100 meters), petitioner advises that KRAY's attempts have been futile. Petitioner states that KRAY desires a more desirable transmitter site, which the requested substitution at Salinas could offer.

[5] Petitioner's proposal includes a signed statement by Martin L. Kline, Jr., President of KCTY AM & KRAY FM, Inc., supporting the proposal, and consenting to the frequency change and transmitter site relocation, provided petitioner reimburses it for the costs incurred in the requested change in the facilities of Station KRAY-FM. Absent this statement, we would not entertain an involuntary change in the transmitter site of Station KRAY-FM.

[6] Coordinates at the petitioner's specified site are 36-33-09 and 121-47-17. Although this site is short-spaced to the licensed site of Station KDDB(FM), Channel 223B, Paso Robles, California, at coordinates 35-38-45 and 120-44-16, it meets the minimum distance separation requirements to the site specified in its construction permit (BPH-880624IB) at coordinates 35-21-37 and 120-39-17. Thus, we will not finalize this proceeding until Station KDDB(FM) is licensed accordingly.

[7] Coordinates at the specified site for Station KRAY-FM are 36-38-01 and 121-30-23.

[8] Coordinates used for Channel 280A at Seaside are those of the city reference at 36-36-48 and 121-50-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-19

In the Matter of

Amendment of Section 73.202(b), RM-7117
Table of Allotments,
FM Broadcast Stations.
(Yuma, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1990; Released: February 2, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of UNO Broadcasting Corporation (petitioner), licensee of Station KTTI(FM), Channel 236C2, Yuma, Arizona, seeking the substitution of Channel 236C for Channel 236C2, and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 236C can be allotted to Yuma at the petitioner's specified site 27.3 kilometers (16.9 miles) east[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Additionally, as Yuma is located within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission must obtain the Mexican Government's consent to this proposal.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 236C for Channel 236C2 at Yuma, Arizona. In accordance with established Commission policy, we will propose to modify the license of Station KTTI(FM), as requested by petitioner, in the event Channel 236C is substituted for Channel 236C2 at Yuma. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 236C at Yuma.

4. Accordingly, in order to provide Yuma with expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Yuma, Arizona	226C,236C2, 265A	226C,236C 265A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Tillotson, Esq.
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at the petitioner's specified site are 32-40-22 and 114-20-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-18

In the Matter of

Amendment of Section 73.202(b), RM-7122
Table of Allotments,
FM Broadcast Stations.
(Pine Bluff, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1990; Released: February 2, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Madison Hodges (petitioner), permittee of Station KPBQ-FM, Channel 267A, Pine Bluff, Arkansas, seeking the substitution of Channel 267C3 for Channel 267A and modification of the permit accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 267C3 can be allotted to Pine Bluff at the petitioner's suggested site 11.9 kilometers (7.4 miles) southeast[1] of the community in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 267C3 for Channel 267A at Pine Bluff, Arkansas. As requested, we also propose to modify the Class A permit of Station KPBQ-FM to specify operation on Channel 267C3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 267C3 at Pine Bluff.

4. Accordingly, in order to provide Pine Bluff with an additional expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Pine Bluff, Arkansas	267A	267C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Leonard S. Joyce, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Washington, DC 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at the petitioner's suggested site for Channel 267C3 at Pine Bluff are 34-08-00 and 91-56-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-17

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Pacific Grove and Soledad, California)[1]	RM-7113

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1990; Released: February 2, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by C. R. Pasquier Properties, Inc. (petitioner), licensee of Station KOCN(FM), Channel 285A, Pacific Grove, California, requesting the substitution of Channel 286B1 for Channel 285A at Pacific Grove, and modification of the license for Station KOCN(FM) to specify operation on the higher powered channel. In order to accommodate the request in conformity with the Commission's minimum distance separation requirements, petitioner seeks an additional change to the FM Table of Allotments to substitute Channel 292A for Channel 287A at Soledad, California, a vacant allotment for which three applications are pending.[2]

2. A staff engineering analysis reveals that Channel 286B1 can be substituted for Channel 285A at Pacific Grove at the petitioner's specified site 21.7 kilometers (13.5 miles) southeast [3] of the community. Channel 292A can be substituted for Channel 287A at Soledad in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[4]

3. Since the petitioner's modification request at Pacific Grove conforms with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KOCN(FM) without entertaining other expressions of interest.

4. We will also serve a copy of this *Notice* on the applicants for Channel 287A at Soledad. In the event this proceeding is finalized prior to the issuance of a permit for Channel 287A at Soledad, the applicants may amend their applications accordingly. This may be accomplished without loss of "cut-off" status since no upgrade in the class of channel will result. *See, Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985) and *Sanibel, FL*, 50 FR 32706 (1985).

5. In view of the above, we consider it appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the communities listed below, as follows:

City	Channel No. Present	Proposed
Pacific Grove, California	285A	286B1
Soledad, California	287A	292A

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of the *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 287A at Soledad, California, as follows: Monterey County Broadcasters, Inc., 4610 Briarwood Dr., Sacramento, CA 95821; Soledad Radio Limited Partnership, 329 Walnut Place, King City, CA 93930; Kyra O. Krulicki, 404 Lock Drive, Aptos, CA 95003.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **March 26, 1990,** and reply comments on or before **April 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

C. R. Pasquier Properties
Attn: Roger P. Pasquier, President
P.O. Box KOCN
Pacific Grove, CA 93950

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The petitioner also proposed to substitute Channel 294A for Channel 291A at San Lucas, California, if necessary. Although Channel 291A was counterproposed in MM Docket No. 86-289, that proposal was subsequently withdrawn. *See Santa Margarita and Guadalupe, Califoria,* 2 FCC Rcd 6930 (1987). Thus, that aspect of the petitioner's proposal is moot.

[2] The applicants are Soledad are Kyra O. Krulicki (BPH-880602OI), Soledad Radio Limited Partnership (BPH-880602OC), and Monterey County Broadcasters, Inc. (BPH-880602NL). Although the latter application was dismissed July 28, 1989, reconsideration of that action is pending.

[3] Coordinates used for proposed Channel 286B1 at Pacific Grove, CA, are 36-30-38 and 121-43-57.

[4] Coordinates used for Channel 292A at Soledad are 36-25-36 and 121-19-30. Additionally, we have determined that Channel 292A may be substituted at Soledad at each applicant's specified site, as follows: 36-22-48 and 121-12-57 (BPH-880602OC); 36-23-54 and 121-24-33 (BPH-880602OI); and 36-27-51 and 121-17-52 (BPH-880602NL).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-336

In the Matter of

Amendment of Section 73.606(b)	RM-6800
Table of Allotments,	
TV Broadcast Stations.	
(Paradise and Chico, California)	

REPORT AND ORDER

Adopted: January 2, 1990; Released: February 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5996 (1989), issued in response to a petition filed by Sainte Limited ("Sainte"), permittee of Station KBCP(TV), Channel 46, Paradise, California. The *Notice* proposed that the Table of Allotments be amended by exchanging Channel 46 at Paradise for Channel *30 at Chico, California. This exchange would allow Channel 30, now reserved for noncommercial use, to be dereserved and allotted to Paradise as a commercial station, while simultaneously reserving Channel 46 for noncommercial use at Chico. In addition to the channel exchange, Sainte requested that its construction permit for KBCP be concurrently modified to specify operation on Channel 30. Sainte filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest can be served by this exchange of Channel 30, Chico, and Channel 46, Paradise, California, as the proposed allotments would maintain the present levels of commercial and noncommercial service in these two communities. As we indicated in the *Notice*, operation on Channel 30 would allow Sainte to utilize its existing transmitter equipment without having to make expensive alterations. In addition, Sainte pledged to provide a transmitter building and tower at no charge to any licensee of an educational station operating on the newly reserved Channel 46, Chico.

3. Although no party filed comments indicating its support for or interest in commencing noncommercial operations at Chico, we believe the facts in this case are sufficiently similar to those in *Seaford Delaware*, 43 RR 2d 1551 (1978), to warrant this action, despite our general policy against substituting a higher for lower UHF channel in order to accommodate a commercial interest. We will also modify Sainte's construction permit, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303 (g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 19, 1990,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Paradise, California	30
Chico, California	12, *18, 24 *46

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, and Section 1.87 of the Commission's Rules, the construction permit of Sainte Limited, for Station KBCP(TV), Paradise, California, IS MODIFIED to specify operation on Channel 30 in lieu of Channel 46, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in License BPCT-840627KE except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BPCT-840627KE except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (WHBQ-TV) Memphis, Tennessee	**MM DOCKET NO. 84-1212** File No. BRCT-790402LC
For Renewal of License	
SOUTH JERSEY RADIO, INC. Memphis, Tennessee	**MM DOCKET NO. 84-1213** File No. BPCT-830511KE
NEW SOUTH MEDIA COMPANY Memphis, Tennessee	**MM DOCKET NO. 84-1214** File No. BPCT-830512KE
GREATER MEMPHIS COMMUNICATIONS, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1218** File No. BPCT-830512KI
RIVER CITY COMMUNICATIONS CORPORATION Memphis, Tennessee	**MM DOCKET NO. 84-1219** File No. BPCT-830512KJ
SHELBY BROADCASTING LIMITED PARTNERSHIP Memphis, Tennessee	**MM DOCKET NO. 84-1220** File No. BPCT-830512KL
MEMPHIS TELECASTERS, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1221** File No. BPCT-830512KM
COZZIN COMMUNICATIONS OF MEMPHIS, INC. Memphis, Tennessee	**MM DOCKET NO. 84-1222** File No. BPCT-830512KN
RIVER CITY BROADCASTING, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1224** File No. BPCT-830512KP
For Construction Permit For a New Television Station	
SOUTH JERSEY RADIO, INC. Assignor	
and	File No. BALCT-890801KJ
ADAMS TV OF MEMPHIS, INC. Assignee	
For Consent to Assignment of License for WHBQ-TV	
and Related Application	File No. BLCT-890801KI

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1990; Released: February 2, 1990

By the Commission:

1. Before the Commission are: (1) Joint Petition for Approval of Settlement Agreement and Related Relief filed August 1, 1989 by RKO General, Inc., South Jersey Radio, Inc., New South Media Company, Greater Memphis Communications, Ltd., River City Communications Corporation, Shelby Broadcasting Limited Partnership, Memphis Telecasters, Ltd., COZZIN Communications of Memphis, Inc., River City Broadcasting, Ltd., and Adams TV of Memphis, Inc.; (2) Comments filed September 25, 1989 and November 7, 1989 by the Mass Media Bureau; and (3) Comments of Memphis Telecasters, Ltd. filed October 12, 1989 and Comments filed October 25, 1989 by South Jersey Radio, Inc.

I. SETTLEMENT AGREEMENT

2. In their Joint Petition the parties propose to settle this comparative renewal proceeding. The main features of the proposed settlement are: (1) RKO's renewal application for station WHBQ-TV would be dismissed; (2) the mutually exclusive applications of New South, Greater Memphis, River City Communications, Shelby, Telecasters, COZZIN, and River City Broadcasting would be dismissed; (3) South Jersey's mutually exclusive application for WHBQ-TV would be granted; (4) South Jersey would assign the license for WHBQ-TV to Adams; (5) Adams would acquire the physical and other assets of WHBQ-TV by acquiring GTH-103, Inc., a subsidiary of RKO. Under the agreement Adams would pay RKO $25,350,000 and would pay $13,649,999 to the other applicants and their principals.[1]

3. The parties contend that their settlement would serve the public interest by avoiding further burdensome litigation in this case and by helping to resolve the protracted and complex set of interrelated proceedings originally involving 14 RKO-owned stations, including WHBQ-TV. RKO's basic and comparative qualifications have been at issue in this series of proceedings for more than 24 years.[2] The parties also contend that approval of the agreement will put WHBQ-TV into the hands of an unarguably qualified licensee that would not suffer the same uncertainties as to its future as RKO does. The parties have

submitted affidavits stating that they filed their applications in good faith and not for the purpose of reaching or carrying out a settlement agreement.

4. In connection with the proposed settlement, the parties seek a Commission determination regarding the character qualifications of H. A. Gilliam, Jr., the principal of Telecasters. The parties ask for a ruling that misconduct allegedly committed by Gilliam in this proceeding would not bar him from owning or acquiring other stations. Telecasters' obligations under the settlement agreement are conditioned on a favorable finding on this question. *Settlement Agreement* ¶ 5.1.

5. Dismissal of Telecasters' application would, of course, moot the question of whether Gilliam's alleged misconduct adversely affected Telecasters' qualifications to be the licensee of WHBQ-TV. Gilliam, however, is also a principal of Gilliam Communications, Inc., the licensee of station WLOK in Memphis, and he also has an interest in two pending FM radio applications. The allegations against Gilliam could be revisited in proceedings involving WLOK or a proposal to acquire a new station. *See Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373-74 ¶ 6 (1980).

6. Under some circumstances, at the time a proceeding is designated for hearing, the Commission makes a determination whether the allegations raised against an applicant affect that applicant's ability to retain or acquire other stations. *See Character Qualifications*, 102 FCC 2d 1179, 1220-25 ¶¶ 83-95 (1986), recon. denied, 1 FCC Rcd 421 (1986) (discussing the policy, originally enunciated in *Grayson Enterprises, Inc.*, 79 FCC 2d 936 (1980) and modified by *Transferability of Broadcast Licenses*, 53 RR 2d 126 (1983)). The parties ask that a *Grayson* determination be made here.

II. *GRAYSON* DETERMINATION

7. In the partial initial decision in this proceeding, Administrative Law Judge Richard L. Sippel held that Telecasters lacked the basic qualifications to be a Commission licensee, because Gilliam, the 100 percent stockholder of Telecasters' general partner, committed misconduct. *RKO General, Inc. (WHBQ - TV)*, 2 FCC Rcd 4111 (I.D. 1987). According to the ALJ, Gilliam made misrepresentations and lacked candor in failing to state in Telecaster's application that Telecasters was not financially qualified, and by falsely indicating, in an amendment to Telecasters' application, that Telecasters was financially qualified. The ALJ found that Gilliam compounded this misconduct by lacking candor in his testimony before the Commission. *Id.* at 4136 ¶ 243-44.

8. The ALJ found that, at the time Telecasters filed its application, it did not have reasonable assurance of sufficient funds to meet its estimated costs of construction and operation (approximately $6 million). Gilliam testified that ultimately he expected to raise the necessary funds by securing a bank loan. He did not, however, do so prior to certification. Instead, he relied on oral assurances by Telecasters' limited partners, Joseph Orgill, III and Michael McDonnell, that they would provide the necessary funds. *Id.* at 4132-33 ¶ 211-12. These individuals owned a controlling interest in a company called Orgill Brothers Corporation. They assured Gilliam that the corporation's $13.5 million unrestricted line of credit would be available to Telecasters, if necessary. *Id.* Orgill Brothers had a net worth of nearly $17 million and a "cushion" of at least $6 million unused and unrestricted credit at the time of the discussions, as demonstrated by documentary evidence. *Id.* Gilliam relied on the advice of Orgill and McDonnell based on their "business acumen and reputation and ties to local banks." *Id.* Additionally, Telecasters' attorney also consulted with Orgill and McDonnell and advised Gilliam that the credit available through Orgill Brothers was sufficient to establish Telecasters' financial qualifications. *Id.* at 4133 ¶ 215. [3] The ALJ faulted Gilliam because he did not secure a written agreement from Orgill Brothers and because he did not investigate the actual availability of the promised funds. *Id.* at 4135 ¶ 238, 4137 ¶ 247.

9. Telecasters asserts, assuming arguendo that the alleged misconduct occurred, that there is no substantial likelihood that the allegations against Gilliam would bear upon the operation of other stations. *See Grayson*, 79 FCC 2d at 940 ¶ 10. Telecasters contends that the alleged misconduct is an isolated transgression in that Gilliam has had a 12-year, unblemished record as the owner of WLOK and encountered no problems in filing three prior broadcast applications. Telecasters also contends that the nature of alleged misconduct does not raise pervasive doubts about Gilliam's reliability. Telecasters points out that in *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 ¶¶ 14-16 (1989), recon. pending, the Commission held that an applicant may rely on oral assurances of financing -- as Gilliam did here. Moreover, Telecasters observes that Gilliam relied on advice of counsel in interpreting the financial certification requirement, which was somewhat ambiguous. Finally, Telecasters asserts that this proceeding has had a deterrent impact on Gilliam because he has suffered the indignity of having to publicly defend his character.

10. Greater Memphis and South Jersey support Telecasters' position. The Mass Media Bureau indicates that it has no objection to a ruling that would permit the transfer of WLOK or that would clarify the ability of Gilliam to acquire additional licenses. The Bureau notes that, in pleadings previously filed, it agreed with Telecasters that no misconduct had occurred.

11. We hold that the allegations against Gilliam raise no substantial question about his qualifications to own or acquire other stations.[4] (Initially, we agree with the parties that the public interest benefits of entertaining settlements in the RKO proceedings, discussed below, warrant undertaking a *Grayson* determination here, even if such a determination would not routinely be made in the case of new applicants.) The alleged misconduct does not reflect on Gilliam's character. It is undisputed that, at the time of certification, oral assurances were made to Gilliam that Orgill Brothers' substantial line of credit would be available to provide the necessary financing, that Orgill Brothers in fact had an unused and unrestricted cushion of at least $6 million, and that Gilliam relied on the business reputations of Orgill and McDonnell in accepting these assurances. Given the technical nature of the question involved -- as reflected by our own subsequent consideration of these matters in *Northampton* -- Gilliam's course of action rebuts any inference that he intended to deceive the Commission as to Telecasters' financial qualifications.[5] Thus, Gilliam's actions do not reflect a type of conduct that threatens the integrity of the Commission's processes.[6] *See Character Qualifications*, 102 FCC 2d at 1211 ¶ 61. In view of the foregoing, we find that this matter does

not raise any substantial questions about Gilliam's ability to meet his obligations as a broadcast licensee in the future.

III. PUBLIC INTEREST DETERMINATION

12. We now turn to the more general aspects of the settlement agreement. We have fully considered and approved a settlement agreement similar to the instant one in the KHJ-TV, Los Angeles, California proceeding (Docket Nos. 16679-80). *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988), appeal docketed sub nom. *New South Media Corp. v. FCC*, No. 88-1683 (D.C. Cir. Sept. 19, 1988).[7] We there concluded that strong public interest considerations favor settling what has become one of the most protracted and burdensome proceedings in the Commission's history. Although the circumstances in this case are not identical to those in the Los Angeles proceeding, we believe that essentially the same public interest considerations govern both proceedings. That is, we continue to believe that the public interest is better served in this case by ending this uniquely protracted litigation -- which threatens to continue for many years to come -- so that RKO can withdraw as a licensee and an unquestionably qualified licensee, able to devote its full resources to broadcasting, can take over the ownership of the stations and operate them without a cloud of uncertainty hanging over its head.

13. We also note that approving the settlement would preserve our policy of deterring licensee misconduct. RKO would not receive full compensation for the license. Under the terms of the settlement agreement, RKO would receive only 65 percent of the proceeds of the sale.[8] Further, RKO has already suffered the loss of WNAC-TV in Boston, now worth more than $400 million. And it has received substantially less than full value for 11 stations sold pursuant to other settlements. In addition, RKO must either withdraw entirely from broadcasting or risk the loss of its remaining stations if the Commission finds it unqualified in Phase I of the KHJ-TV proceeding. Consistent with our disposition of the KHJ-TV agreement, therefore, and for the reasons stated more fully there and which we incorporate herein by reference, we hold that approving the agreement before us would serve the public interest. Similarly, we find that the agreement complies with 47 U.S.C. § 311(d) and 47 C.F.R. § 73.3525. We note, moreover, that in pleadings filed September 25 and November 7, 1989, the Bureau states that it has no objections to approval of the settlement agreement. The Bureau also states that it has reviewed the assignment application and finds that the proposed assignee is qualified.

IV. ORDERS

14. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Approval of Settlement Agreement and Related Relief filed August 1, 1989 IS GRANTED and the associated Agreements ARE APPROVED.[9]

15. IT IS FURTHER ORDERED, That the following applications for renewal of license and for construction permits ARE DISMISSED with prejudice: RKO General, Inc. (File No. BRCT-790402LC), New South Media Corporation (File No. BPCT-830512KE), Greater Memphis Communications, Ltd. (File No. BPCT-830512KI), River City Communictions Corporation (File No. BPCT-830512KJ), Shelby Broadcasting, Limited Partnership (File No. BPCT-830512KL), Memphis Telecasters, Ltd. (File No. BPCT-830512KM), COZZIN Communications of Memphis, Inc. (File No. BPCT-830512KN), and River City Broadcasting, Ltd. (File No. BPCT-830512KP); and that the applications of South Jersey Radio, Inc. (File Nos. BPCT-830512KE, BLCT-890801KI) for construction permit and for license to cover the construction permit ARE GRANTED; and that the application of South Jersey Radio, Inc. to assign WHBQ-TV to Adams TV of Memphis, Inc. (File No. BALCT-890801KJ) IS GRANTED.

16. IT IS FURTHER ORDERED, That the partial initial decision dealing with the qualifications of the various applicants for a construction permit (*RKO General, Inc. (WHBQ - TV)*, 2 FCC 4111 (I.D. 1987)) IS VACATED as moot;[10] that the allegations raised in this proceeding concerning H. A. Gilliam, Jr. ARE DEEMED not to bear on his ability to own or acquire additional broadcast stations; and that the Review Board IS DIRECTED to dismiss as moot exceptions to the partial initial decision dealing with the comparative qualifications of the various applicants.[11]

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The payments to the other applicants would be distributed as follows:

South Jersey (and a principal)	$ 859,950
New South	$2,734,095
Greater Memphis (and its principals)	$1,607,144
River City Communications (and its principals)	$2,734,095
Telecasters (and its principals)	$1,640,477
Shelby (and its principals)	$1,607,144
COZZIN (and a principal)	$ 859,950
River City Broadcasting	$1,607,144

[2] A detailed history of these proceedings is set forth in *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988).

[3] Telecaster's attorney confirmed that he had deliberately not checked off the box on Telecasters' application certifying generally that Telecasters was financially qualified because he believed that it was sufficient to check "yes" to a second, more specific question regarding financial commitments. 2 FCC Rcd at 4133 ¶ 218. Telecasters' attorney observed that the financial certification procedure was relatively new at the time, and he considered the application ambiguous in this regard.

[4] As the parties point out, in making a *Grayson* determination, we do not undertake to review the merits of the decision below. (Indeed, ordinarily, such a determination would be made at the time a hearing on alleged misconduct was designated, rather than after a decision.) Rather, we assume that the alleged misconduct occurred as found and consider its implications with respect to the applicant's qualifications to hold or acquire other

stations. *See* Joint Petition for Approval of Settlement Agreement and Related Relief at 10 n.19. In this case, however, our examination of the ALJ's findings leads us to a conclusion significantly different from the ALJ's, which was based on precedent that the Commission has since disavowed. *See* paragraph 11, below. Thus, in this case, we have, of necessity, implicitly overturned the initial decision in this narrow regard.

[5] Additionally, Gilliam sought the advice of counsel in concluding that the assurances he received were a sufficient basis upon which to certify Telecasters' financial qualifications. Under the circumstances, this further supports the conclusion that Gilliam's certification does not reflect deceit.

[6] As the ALJ points out, an examination of Orgill Brothers' lines of credit leaves unresolved some questions about their use to finance a broadcast venture and, thus, Telecasters' financial qualifications. 2 FCC Rcd at 4135 ¶ 238. Even if we were to conclude, however, that Telecasters had not demonstrated its financial qualifications, we would still find that Gilliam made his certification in good faith.

[7] We have also approved seven settlements involving 11 other RKO stations. *See RKO General, Inc. (WHBQ),* 3 FCC Rcd 5055 (1988); *RKO General, Inc. (WGMS),* 3 FCC Rcd 5262 (1988); *RKO General, Inc. (WRKO),* 3 FCC Rcd 6603 (1988); *RKO General, Inc. (WOR),* 4 FCC Rcd 4072 (1989); *RKO General, Inc. (WFYR-FM),* 4 FCC Rcd 4083 (1989); *RKO General, Inc. (KRTH),* 4 FCC Rcd 4089 (1989); *RKO General, Inc. (WOR),* 4 FCC Rcd 5747 (1989).

[8] As in *KHJ-TV,* it is significant to our approval of the agreement that RKO is receiving significantly less than 75 percent of the fair market value of the station.

[9] As they have requested, the parties may consummate the mutually contingent transactions in a single closing. Our action shall be effective with respect to the termination of the parties' hearing rights upon their notifying us of closing under those transactions.

[10] The parties request this relief, and it is customary practice. *See United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950); *Boston Community Media Committee, Minority Caucus v. FCC,* 509 F.2d 516, 517 (D.C. Cir. 1975).

[11] In a previous order, we directed that exceptions relating to Gilliam's qualifications be certified to the Commission. *RKO General, Inc. (WHBQ-TV),* 4 FCC Rcd 7214 (1989). The Board certified the relevant exceptions. *RKO General, Inc.,* 4 FCC Rcd 7753 (Rev. Bd. 1989). These exceptions are also dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (WAXY-FM)
Fort Lauderdale, Florida

For Renewal of License

MM DOCKET NO. 84-1112
File No. BRH-781002WR

ADWAVE COMPANY
Fort Lauderdale, Florida

MM DOCKET NO. 84-1113
File No. BPH-830510AL

SOUTH JERSEY RADIO, INC.
Fort Lauderdale, Florida

MM DOCKET NO. 84-1114
File No. BPH-830511AK

COZZIN COMMUNICATIONS COMPANY
Fort Lauderdale, Florida

MM DOCKET NO. 84-1116
File No. BPH-830512AW

Rosemarie A. Reardon d/b/a LAUDERSEA BROADCASTING COMPANY
Fort Lauderdale, Florida

For Construction Permit for a new FM Station

MM DOCKET NO. 84-1118
File No. BPH-830512CP

SOUTH JERSEY RADIO, INC.
Assignor

and

File No. BALH-890814ED

GRADH-105, INC., as owned by ACKERLEY RADIO OF FLORIDA, INC.
Assignee

For Consent to Assignment of License for WAXY-FM

and Related Application

File No. BLH-890814KI

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1990; Released: February 2, 1990

By the Commission:

1. Before the Commission are: (1) Joint Petition for Approval of Settlement Agreement and Related Relief filed August 11, 1989 by RKO General, Inc., Adwave Company, South Jersey Radio, Inc., COZZIN Communications Corporation, Rosemarie A. Reardon d/b/a Laudersea Broadcasting Company, and Ackerley Radio of Florida, Inc.; (2) statements filed September 13, 1989 by Adwave and September 21, 1989 by Laudersea; (3) Comments filed October 11, 1989 and November 16, 1989 by the Mass Media Bureau; and (4) a reply filed October 23, 1989 by Adwave.

I. SETTLEMENT AGREEMENT

2. In their Joint Petition the parties propose to settle this comparative renewal proceeding. The main features of the proposed settlement are: (1) RKO's renewal application for station WAXY-FM would be dismissed; (2) the mutually exclusive applications of Adwave, COZZIN, and Laudersea would be dismissed; (3) South Jersey's mutually exclusive application for WAXY-FM would be granted; (4) South Jersey would assign the license for WAXY-FM to GRADH-105, Inc. (GRADH-105, Inc., is currently a subsidiary of RKO; it will be acquired by Ackerley as part of this transaction); (5) Ackerley would acquire the physical and other assets of WAXY-FM by acquiring GRADH-105, Inc. Under the agreement Ackerley would pay RKO $12,600,000 and would pay $8,400,000 to the other applicants and their principals.[1]

3. The parties contend that their settlement would serve the public interest by avoiding further burdensome litigation in this case and by helping to resolve the protracted and complex set of interrelated proceedings originally involving 14 RKO-owned stations, including WAXY-FM. RKO's basic and comparative qualifications have been at issue in this series of proceedings for more than 24 years.[2] The parties also contend that approval of the agreement will put WAXY-FM into the hands of an unarguably qualified licensee that would not suffer the same uncertainties as to its future as RKO does. The parties have submitted affidavits stating that they filed their applications in good faith and not for the purpose of reaching or carrying out a settlement agreement.

4. In connection with the proposed settlement, the parties seek a Commission determination regarding the character qualifications of (1) George F. Gardner, the principal of Adwave, and (2) Rosemarie A. Reardon, the principal of Laudersea. The parties ask for a ruling that misconduct allegedly committed by Gardner and Reardon in this proceeding will not bar them from acquiring other stations. The obligations of Adwave and Laudersea under the settlement agreement are conditioned on a favorable finding on this question. *Settlement Agreement* ¶¶ 5.3, 5.4.

5. Dismissal of the relevant applications would, of course, moot the question of whether the alleged misconduct by Gardner and Reardon adversely affected the qualifications of Adwave and Laudersea to be the licensee of WAXY-FM. However, the allegations against Gardner and Reardon could be revisited in connection with any

proposal by these individuals to acquire a new station. *See Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373-74 ¶ 6 (1980).

6. Under some circumstances, at the time a proceeding is designated for hearing, the Commission makes a determination as to whether the allegations raised against an applicant affect that applicant's ability to retain or acquire other stations. *See Character Qualifications*, 102 FCC 2d 1179, 1220-25 ¶¶ 83-95 (1986), recon. denied, 1 FCC Rcd 421 (1986) (discussing the policy, originally enunciated in *Grayson Enterprises, Inc.*, 79 FCC 2d 936 (1980) and modified by *Transferability of Broadcast Licenses*, 53 RR 2d 126 (1983)). The parties ask that a *Grayson* determination be made here.

II. *GRAYSON* DETERMINATION

7. In a decision in this proceeding, the Review Board held that Adwave and Laudersea lacked the basic qualifications to be Commission licensees. *RKO General, Inc. (WAXY - FM)*, 4 FCC Rcd 4679 (Rev. Bd. 1989). The Board affirmed a finding to that effect made in the partial initial decision by Administrative Law Judge Joseph Stirmer. *RKO General, Inc. (WAXY - FM)*, 2 FCC Rcd 3348 (I.D. 1987). George F. Gardner is the 100 percent stockholder of Adwave, and Rosemarie A. Reardon is the sole proprietor of Laudersea.

8. The Board found that Gardner lacked candor before the Commission in connection with his categorical pledge that he and his wife would "divest themselves of all of the stock they own" in several cable systems. By means of this pledge, Gardner intended that these interests should not be attributed to Adwave in the comparative analysis of the applicants. According to the Board, Gardner had no intention of divesting himself of these stock interests. Rather, it was revealed that he intended to place the stock in a voting trust that retained for him almost all of the benefits of stock ownership, including the ability to participate in the management of the cable systems. 4 FCC Rcd at 4683 ¶¶ 22-24.

9. The Board held that the trust arrangement was an ineffective and disingenuous attempt to obtain a comparative advantage. Additionally, the Board found that Gardner, an experienced businessman, knew that the trust arrangment could not fairly be described as a "divestiture" of the stock. *Id.* at 4684 ¶ 29.

10. The Board found that Reardon had falsely certified that Laudersea was financially qualified to be a licensee. Laudersea did not have net liquid assets on hand or available from committed sources to meet its initial costs of construction and operation. *Id.* at 4688 ¶ 43. Although Reardon discussed financing generally with a local banker, the banker made no commitment -- oral or written -- to Laudersea. *Id.* at 4685-86 ¶¶ 36-37. The Board found that Reardon had no reasonable basis for certifying that Laudersea was financially qualified or for representing that Laudersea had a bank commitment. *Id.* at 4688 ¶ 44. In the Board's view, Reardon had been disingenuous and recklessly disregarded the truth in so doing. *Id.* at 4689 ¶ 48.

11. Despite these findings of misconduct, both Adwave and Laudersea assert that their principals can be found qualified to acquire additional stations. Both claim that the alleged misconduct represents isolated misjudgment that will not recur at other stations. They also contend that their principals will be deterred from further misconduct by the painful litigation in this proceeding.

12. More specifically, Adwave emphasizes that the alleged misconduct did not involve a continuing effort to mischaracterize Gardner's intentions. Adwave maintains that after questions were raised about Gardner's divestiture pledge at a deposition, Gardner fully disclosed his plans. Adwave also asserts that Gardner has had an unblemished past broadcast record in connection with his ownership of WQVE-FM in Mechanicsburg, Pennsylvania (1978-82), WEEO in Waynesboro, Pennsylvania (1971-80 and 1983-84), and WTTO in Toledo, Ohio (1973-76).

13. Similarly, Laudersea attributes the alleged misconduct to Reardon's inexperience in broadcasting and the inadequate assistance of her communications counsel. According to Laudersea, Reardon's good faith is demonstrated by the fact that, after questions were raised about her conduct, she acted expeditiously to cure Laudersea's financial deficiencies and retained new communications counsel.

14. Accordingly, Adwave and Laudersea argue that there is no substantial likelihood that the allegations against Gardner and Reardon would bear upon the operation of other stations. *See Grayson*, 79 FCC 2d 940 ¶ 10. As an additional matter, Adwave and Laudersea contend that granting their requested relief will serve the public interest by helping to resolve the RKO proceedings.

15. The Mass Media Bureau opposes the requested relief. The Bureau argues that Gardner and Reardon were found to have committed serious misconduct that impeaches their truthfulness and reliablity vis-a-vis future applications. Moreover, the Bureau asserts that a failure to take this misconduct in account would undermine the deterrent aspects of the licensing process. Procedurally, the Bureau questions whether the rationale for permitting an existing licensee in hearing to transfer co-owned stations, not involved in misconduct, should be extended to permit a new applicant of doubtful character to acquire other stations. Hence, the Bureau contends that there is no justification here for ruling that Gardner and Reardon may freely acquire additional stations. In the Bureau's view, the fact that this is one of the RKO proceedings does not warrant special treatment.

16. In its reply to the Bureau, Adwave concedes that the Commission does not ordinarily make a *Grayson* determination in proceedings involving new applicants. Adwave asserts that such a determination is warranted here because (1) there is no need to postpone a determination of Gardner's qualifications, given the availability of a full record here, and (2) a favorable determination would facilitate the resolution of the *RKO* proceedings. Adwave asserts that a new applicant found unqualified in one proceeding is not automatically disqualified from receiving a different authorization. In view of the unique nature of this proceeding, Adwave contends that a favorable *Grayson* determination would not undermine considerations of deterrence.

17. Initially, we agree with the parties that the public interest benefits of entertaining settlements in the RKO proceedings warrant undertaking a *Grayson* determination here, although such a determination would not routinely be made in the case of new applicants. As we have noted, settlements in the RKO proceedings offer the possibility of terminating one of the most protracted and burdensome proceedings in the Commission's history and

putting RKO's stations into the hands of unquestionably qualified licensees able to devote their full resources to broadcasting. We have recognized that undertaking a *Grayson* determination in the case of a new applicant is somewhat more difficult than it is in the case of an existing licensee. *Character Qualifications*, 102 FCC 2d at 1225 ¶ 95. In view, however, of the unusual public interest benefits of the settlement process in the RKO proceedings, we will undertake this more difficult task here.

18. Turning to the merits, we will grant the relief requested by the parties -- but only conditionally. We cannot find on the record before us that Gardner and Reardon are qualified, without reservation, to acquire additional stations. As the Bureau points out, Gardner and Reardon allegedly committed serious misconduct that we cannot ignore. [3] The Commission believes that truthfulness is a key element of character necessary to operate a broadcast station in the public interest. *Character Qualifications*, 102 FCC 2d at 1210 ¶ 60.[4] Misconduct involving such a deficiency does not, however, necessarily bar an applicant from further broadcast ownership. In some cases, we have found that an isolated transgression does not disqualify an applicant from further broadcast ownership. *See United Broadcasting, Inc.*, 100 FCC 2d 1574, 1583-86 ¶¶ 20-25 (1985); *WIOO, Inc.*, 95 FCC 2d 974, 983-84 ¶ 23 (1983); *Faulkner Radio, Inc.*, 88 FCC 2d 612, 615-18 ¶¶ 11-17 (1981).[5] These cases, however, involved factors not present here -- for example, the deterrent impact of previously having an application denied, as a basis for concluding that a recurrence of misconduct is unlikely.

19. Thus, these cases do not directly support a finding that Gardner and Reardon may be found unconditionally qualified to acquire additional stations. Nonetheless, other factors suggest that the alleged misconduct should not necessarily bar Gardner or Reardon from acquiring additional stations. Several years will have elapsed since the alleged misconduct assertedly occurred.[6] The applicants may be able to show that their conduct and compliance with the law during the intervening time between the alleged misconduct and the filing of new applications has been beyond reproach. The factor of rehabilitation will be significant to any future determination as to their fitness to be broadcast licensees. *See Character Qualifications*, 102 FCC 2d at 1228-29 ¶ 105.

20. In this regard, the alleged misconduct, although serious, represents an isolated incident and not a pattern of repeated misconduct suggesting a pervasive unwillingness or inability to meet the basic responsibilities of a licensee. (Indeed, Gardner has an unblemished prior broadcast ownership record.) *See Faulkner*, 88 FCC 2d at 616 ¶ 12. Hence, the alleged misconduct here does not inherently indicate that Gardner and Reardon should be barred from further broadcast ownership in perpetuity.[7]

21. Accordingly, we will afford Gardner and Reardon the opportunity to submit a showing of good character in connection with any application for a new station. If, in their showing, the applicants make an affirmative demonstration of rehabilitation and establish that they then possess good character, we would regard such a showing as favorably resolving our concerns about the alleged misconduct. At minimum, the submission should demonstrate that: (1) the applicant has not been involved in any significant wrongdoing since the alleged broadcast-related misconduct occurred; (2) the applicant enjoys a reputation for good character in the community; and (3) the applicant intends to undertake meaningful measures to prevent the future occurrence of FCC-related misconduct. *See, e.g., Central Broadcasting Co.*, 11 FCC 259, 280-81 ¶¶ 6-8 (1946); *Catamount Broadcasters, Inc.*, 70 FCC 2d 913, 916-18 ¶¶ 7-11 (Rev. Bd. 1976). Of course, there should be no occurrence of misconduct in connection with the new application. The applicants' submissions will be subject to scrutiny by the Mass Media Bureau, which may make further inquiries if deemed necessary. Moreover, any persons with adverse information about the applicants may submit this to the Commission.

22. In our view, these measures will serve to impress on Gardner and Reardon, as well as applicants generally, the seriousness with which we view relevant misconduct. We emphasize that Gardner and Reardon do not walk away from the alleged misconduct "scot-free" but remain subject to heightened scrutiny necessitating an affirmative good character showing (which is not ordinarily required of applicants). A further point should also be clearly understood. As a procedural matter, we have found that the public interest benefits of settlements in the RKO proceedings warrant undertaking a *Grayson* determination in a situation where we would not routinely undertake one. Substantively, however, we have not reduced our concern for licensee character merely because this is an RKO proceeding.

III. PUBLIC INTEREST DETERMINATION

23. We now turn to the more general aspects of the settlement agreement. We have fully considered and approved a settlement agreement similar to the instant one in the KHJ-TV, Los Angeles, California proceeding (Docket Nos. 16679-80). *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988), appeal docketed sub nom. *New South Media Corp. v. FCC*, No. 88-1683 (D.C. Cir. Sept. 19, 1988).[8] We there concluded that strong public interest considerations favor settling what has become one of the most protracted and burdensome proceedings in the Commission's history. Although the circumstances in this case are not identical to those in the Los Angeles proceeding, we believe that essentially the same public interest considerations govern both proceedings. That is, we continue to believe that the public interest is better served in this case by ending this uniquely protracted litigation -- which threatens to continue for many years to come -- so that RKO can withdraw as a licensee and an unquestionably qualified licensee, able to devote its full resources to broadcasting, can take over the ownership of the stations and operate them without a cloud of uncertainty hanging over its head.

24. We also note that approving the settlement would preserve our policy of deterring licensee misconduct. RKO would not receive full compensation for the license. Under the terms of the settlement agreement, RKO would receive only 60 percent of the proceeds of the sale.[9] Further, RKO has already suffered the loss of WNAC-TV in Boston, now worth more than $400 million. And it has received substantially less than full value for 11 stations sold pursuant to other settlements. In addition, RKO must either withdraw entirely from broadcasting or risk the loss of its remaining station if the Commission finds it unqualified in Phase I of the KHJ-TV proceeding. Consistent with our disposition of the KHJ-TV agreement, therefore, and for the reasons stated more fully there and which we

incorporate herein by reference, we hold that approving the agreement before us would serve the public interest. Similarly, we find that the agreement complies with 47 U.S.C. § 311(d) and 47 C.F.R. § 73.3525.

25. We note, moreover, that in pleadings filed October 11 and November 16, 1989, the Bureau states that it has no objections to approval of the settlement agreement (other than its objections under the *Grayson* question). The Bureau also states that it has reviewed the assignment application and finds that the proposed assignee is qualified. In this regard, the Bureau recommends that we grant Ackerley a waiver of the Commission's attribution rules. *See* 47 C.F.R. § 73.3555 Note 2(h).

26. The need for a waiver arises from the following facts. John A. Canning, a director of Ackerley's parent corporation, is the president of First Financial Investment Corporation. First Financial and an affiliated company own a 21 percent nonvoting stock interest in the licensee of station WLTV(TV) in Miami, Florida (part of the same market as Fort Lauderdale). Canning's dual interests do not violate the Commission's rules, but they might raise a question under the Commission's cross-interest policy. This is so because Ackerley's interest in WAXY-FM is attributable to Canning under the Commission's rules and First Financial's interest in WLTV(TV), although not attributable under the rules (because a nonvoting stock interest is involved), is significant for cross-interest purposes. *See Reexamination of the Commission's Cross - Interest Policy*, 2 FCC Rcd 3699, 3700 ¶ 12 (1987), 4 FCC Rcd 2035, 2036-37 ¶¶ 12-13 (1989).

27. Consistent with the criteria set forth in 47 C.F.R. § 73.3555 Note 2(h), Ackerley has submitted documentation indicating that Canning's responsibilities as a director of Ackerley's parent are wholly unrelated to broadcasting. Thus, as provided by the rule, we will waive the attribution of Ackerley's interest in WAXY-FM to Canning that would otherwise result from his status as a director of Ackerley's parent. The waiver of attribution breaks the problematic nexus between WAXY-FM and WLTV(TV) and thereby eliminates the possibility of a cross-interest problem.

IV. ORDERS

28. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Approval of Settlement Agreement and Related Relief filed August 11, 1989 IS GRANTED and the associated Agreements ARE APPROVED.[10]

29. IT IS FURTHER ORDERED, That 47 C.F.R. § 73.3555 Note 2(h) IS WAIVED to the extent that it would otherwise attribute the media interests of John A. Canning to Ackerley Radio of Florida, Inc.

30. IT IS FURTHER ORDERED, That the following applications for renewal of license and for construction permits ARE DISMISSED with prejudice: RKO General, Inc. (File No. BRH-781002WR), Adwave Company (File No. BPH-830510AL), COZZIN Communications Corporation (File No. BPH-830512AW), and Laudersea Broadcasting Company (File No. BPH-830512CP); and that the applications of South Jersey Radio, Inc. (File Nos. BPH-830511AK, BLH-890814KI) for construction permit and for license to cover the construction permit ARE GRANTED; and that the application for the assignment of of WAXY-FM (File No. BALH-890814ED) IS GRANTED.

31. IT IS FURTHER ORDERED, That the partial initial decision and the Review Board decision dealing with the qualifications of the various applicants for a construction permit (*RKO General, Inc. (WAXY - FM)*, 2 FCC 3348 (I.D. 1987), aff'd, 4 FCC Rcd 4679 (Rev. Bd. 1987) ARE VACATED as moot;[11] that the allegations raised in this proceeding concerning George F. Gardner and Rosemarie A. Reardon ARE DEEMED not to bear on their ability to acquire additional broadcast stations, provided that they submit, in conjunction with any application for a new station, an adequate showing of good character, as set forth in paragraph 21 above; that the applications for review of the Board's decision filed July 6 and 7, 1989 concerning the comparative qualifications of the various applicants ARE DISMISSED as moot;[12] and that the Review Board IS DIRECTED to dismiss as moot the petition for reconsideration dealing with the qualifications of Adwave.

32. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The payments to the other applicants would be distributed as follows:

Adwave	$2,000,000
South Jersey (and a principal)	$2,900,000
COZZIN (and a principal)	$1,500,000
Laudersea	$2,000,000

[2] A detailed history of these proceedings is set forth in *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988).

[3] As the parties point out, in making a *Grayson* determination, we do not undertake to review the merits of the decision below. (Indeed, ordinarily such a determination would be made at the time a hearing on alleged misconduct was designated, rather than after a decision.) Rather, we assume that the alleged misconduct occurred as found and consider its implications with respect to the applicant's qualifications to acquire stations in the future. *See* Joint Petition for Approval of Settlement Agreement and Related Relief at 10 n.20.

[4] This case differs from *RKO General, Inc. (WHBQ - TV)*, FCC 90-17 (adopted Jan. 11, 1989), in which we held that a dismissing applicant's alleged false certification of his financial qualifications did not bar his acquisition of additional stations. There, we concluded that the ALJ's findings of fact, on their face, did not suggest a lack of honesty. We therefore, of necessity, implicitly overturned the initial decision (which was based on precedent that the Commission has since disavowed) in that narrow regard. The ALJ found that the applicant had received oral assurances that necessary funds would be available and had been advised by his attorney that these assurances were adequate. In this case, the Board's findings indicate greater culpability.

[5] We find these cases more apposite than *Straus Communications, Inc.*, 2 FCC Rcd 7469 (1987), cited by the parties. In *Straus*, the Commission held that allegations of misconduct, including false financial certification, did not bar a licensee from transfering a station uninvolved in the alleged misconduct. That decision turned to a significant extent on procedural and public interest factors, not relevant here, specifically relating to the transfer of a licensee's existing station. The Commission noted that no limitation had been put on the transferability of the station in question and that the public interest favored the immediate transfer of the station to a qualified applicant. Because the applicants here seek the right to acquire stations rather than divest themselves of stations, the specific rationale of *Straus* cannot be applied to the facts before us. We therefore consider it more appropriate to examine precedent relating more generally to the character qualifications of multiple owners.

[6] For example, Gardner filed the amendment containing his original divestiture pledge on March 27, 1984 and repeated it in a hearing exhibit filed February 19, 1985. 4 FCC Rcd at 4680 ¶ 10, 4681 ¶ 13. Reardon filed the application with the allegedly false certification on May 12, 1983. Adwave Exh. 8.

[7] Compare *L. D. S. Enterprises, Inc.*, 86 FCC 2d 283 (1981). There, the Commission considered an application to acquire a new station by a proposed assignee whose licenses for five co-owned stations had previously been denied because of misconduct. The applicant submitted a showing that he had conducted his affairs in an ordinary and prudent fashion since the loss of his licenses and that he was willing to undertake remedial measures to ensure future compliance with his obligations as a licensee. That applicant's showing was deemed inadequate because of the gravity of his past conduct -- a willful and knowing pattern of misconduct and complete disregard of his responsibilities as a broadcaster -- and his application was designated for a modified hearing procedure. 86 FCC 2d at 286 ¶ 7.

[8] We have also approved seven settlements involving 11 other RKO stations. *See RKO General, Inc. (WHBQ)*, 3 FCC Rcd 5055 (1988); *RKO General, Inc. (WGMS)*, 3 FCC Rcd 5262 (1988); *RKO General, Inc. (WRKO)*, 3 FCC Rcd 6603 (1988); *RKO General, Inc. (WOR)*, 4 FCC Rcd 4072 (1989); *RKO General, Inc. (WFYR-FM)*, 4 FCC Rcd 4083 (1989); *RKO General, Inc. (KRTH)*, 4 FCC Rcd 4089 (1989); *RKO General, Inc. (WOR)*, 4 FCC Rcd 5747 (1989).

[9] As in KHJ-TV, it is significant to our approval of the agreement that RKO is receiving significantly less than 75 percent of the fair market value of the station.

[10] As they have requested, the parties may consummate the mutually contingent transactions in a single closing. Our action shall be effective with respect to the termination of the parties' hearing rights upon their notifying us of closing under those transactions.

[11] The parties request this relief, and it is customary practice. *See United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950); *Boston Community Media Committee, Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975). This action does not affect those portions of the Board's decision dealing with the basic qualifications of COZZIN, which are relevant to another pending proceeding.

[12] With the exception of the application for review filed by COZZIN.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-26

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to require that VHF ship station transmitters automatically cease operation after a predetermined period of operation. RM-6770

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1990; Released: February 5, 1990

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to require that VHF ship station transmitters be equipped with (1) an automatic timing device that deactivates the transmitter after an uninterrupted transmission period of more than three minutes and (2) a device that provides an indication that the timer has deactivated the transmitter. We are initiating this rule making proceeding in response to a petition filed by the Southern California Marine Radio Council.

II. BACKGROUND

2. VHF channels in the 156-162 MHz band are used in the maritime mobile service by ship stations to communicate with other ship stations or with coast stations. Channels are available for safety communications, calling, operational and navigational purposes. Additionally, channels are available for public correspondence. *See* Section 80.373(f) of our rules, 47 C.F.R. § 80.373(f).

3. Channel 16 (156.800 MHz) is used as a safety and calling channel. The United States Coast Guard (USCG) maintains an aural watch on channel 16 and responds to distress calls made on this channel. Ships equipped with VHF stations for compliance with the Communications Act of 1934, as amended, 47 U.S.C. Title III, the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, or the Agreement Between the United States of America and Canada for the Promotion of Safety on the Great Lakes by Means of Radio, T.I.A.S. 7837, amended T.I.A.S. 9352, are required to maintain a watch on channel 16 when the station is not being used for other traffic. Ship stations voluntarily equipped with a VHF station are required to maintain a watch on channel 16 when the station is operating and not being used for other traffic. While VHF channels may be used to meet a variety of communications requirements, the primary purpose of these channels is to provide for safety of life and property at sea. Thus, it is extremely important to minimize interference on these channels.

4. During the past several years, the Commission's Field Operations Bureau (FOB), which is responsible for resolving interference to safety communications, has been studying VHF marine radio operations.[1] One of the problem areas identified during the course of this study of marine VHF channels has been "stuck carriers". For example, FOB reported that its Boston Region located thirty "stuck carriers" on channel 16 in 1987, twenty-nine of which were caused by unintentional activation of the transmitters. FOB estimates, however, that only a small percentage of the total number of "stuck carriers" are actually reported to FOB offices.[2] Further, according to FOB, it locates only about 30 per cent of the "stuck carriers" reported. The other 70 per cent go off the air prior to one of its investigators locating the source.

III. PROPOSAL

5. The Southern California Marine Radio Council (SCMRC) submitted a Petition for Rule Making (Petition) received May 11, 1989, Public Notice provided June 2, 1989. SCMRC requests that all VHF ship station transmitters operating in the maritime mobile band be required to have a signal time-out timer incorporated into the transmitter that would disable the transmitter after a certain period of continuous operation. SCMRC suggests this requirement become effective after January 1, 1991, for all newly manufactured or imported VHF ship station transmitters. [3]

6. SCMRC states that the time-out timer would eliminate the repeated problem of "stuck carriers" on VHF channel 16 and other channels caused by the inadvertent activation of the transmitter by improper microphone placement.[4] SCMRC notes that harmful interference is frequently caused to the Coast Guard's monitoring of channel 16 by continuous carriers masking weaker signals.[5] To resolve this problem SCMRC suggests that we require ship station transmitters to be equipped with a simple timer that would turn the transmitter off after a few minutes.

IV. DISCUSSION

7. We are concerned about interference on marine channels, especially on safety channels such as channel 16. We believe the public would benefit in terms of increased marine safety by reducing interference on marine VHF channels. Automatic time-out timers have been required for years in certain private land mobile stations to minimize inadvertent "stuck carriers".[6] We believe any increase in equipment costs to manufacturers resulting from this requirement would be minimal. Therefore, we propose to require VHF ship station transmitters manufactured or imported into the United States after July 31, 1992, or installed after July 31, 1993, to be equipped with an automatic timing device that deactivates the transmitter after any uninterrupted transmission period in excess of three minutes. These phase out periods should provide sufficient time for manufacturers to respond to equipment modifications and for dealers to clear their inventories. We are proposing that VHF ship station transmitters installed on or before July 31, 1993, be grandfathered indefinitely while located at the same ship station or coast

station.[7] We request comments, however, regarding the proposed phase out periods. We also request comments on the effect this proposal would have on public correspondence and duplex operations.[8]

8. It has been our experience that most uninterrupted communications last considerably less than three minutes. Consequently, we do not believe restricting uninterrupted marine transmissions to three minutes will impair effective communications. Nevertheless, we specifically request comments on what uninterrupted time period should be specified before deactivation is required.

9. Additionally, we are proposing that a clear indication be made when the time-out timer deactivates the carrier. This is necessary as a safety precaution to alert the operator that the VHF transmitter is no longer radiating. This could be done through a visual indicator or aurally by use of a tone. Again, we believe that any equipment costs to manufacturers resulting from this requirement would be minimal. We request comments, however, concerning whether the benefits derived from this proposal justify any additional manufacturing costs that may be incurred. We also request comments on whether the particular deactivation indicating device should be a matter of manufacturer discretion, as proposed, or specifically required to be visual, aural or both visual and aural.

10. The harmful interference created by "stuck carriers" has an adverse impact on marine communications in general and specifically on safety communications. "Stuck carriers" reduce the effectiveness of remote monitoring by masking radio communications and have the potential of causing distress communications to be missed. Because of the safety of life and property at sea would be enhanced with little additional costs, we believe the proposed requirements are in the public interest.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

11. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our initial analysis is as follows:

Reason For Action

12. This action is being taken to incorporate into the Commission's Rules a requirement that would eliminate prolonged inadvertent keying of VHF shipboard transmitters operating in the maritime mobile service. The intended effect would be to enhance maritime safety and conserve enforcement oriented resources.

Objectives

13. The proposed rules would require manufacturers of VHF shipboard radio equipment to design the transmitters to include a timing device that would automatically deactivate the transmitter after a predetermined period of time and a device that would provide an indication that the carrier had been turned off by the timer. The objective is to phase out the prolonged inadvertent keying of VHF shipboard transmitters.

Legal Basis

14. The proposed action is authorized under Sections 4(i), 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

Reporting, Recordkeeping And Other Compliance Requirements

15. Shipboard VHF maritime radio station transmitters not having the capability to automatically cease operation after three minutes of continuous transmission time would be phased out. Transmitters either newly manufactured or imported into the United States after July 31, 1992, or installed after July 31, 1993, for use at a maritime station must automatically turn the carrier off after three minutes of uninterrupted operation. Additionally, these transmitters would be required to provide an indication that the carrier had been turned off. Transmitters meeting the new requirements must be type accepted.

Federal Rules Which Overlap, Duplicate, Or Conflict With This Rule

16. None.

Description, Potential Impact, And Number Of Small Entities Involved

17. The greatest initial impact of the proposed rules will be on manufacturers of shipboard VHF transmitters (approximately twelve in number). A relatively simple design change that is not expected to appreciably increase the cost of manufacturing these transmitters would be necessary. We believe the equipment phase out periods will provide sufficient time for manufacturer, dealers, and consumers to respond in such a manner that any adverse impact will be minimized.

Any Significant Alternatives Minimizing The Impact On Small Entities And Existing Licensees And Consistent With the Stated Objective

18. This *Notice* specifically requests comments regarding the time proposed to phase out the manufacture and installation of VHF ship station transmitters. Further, this *Notice* requests comments concerning whether these benefits derived from the proposed rules justify any additional manufacturing costs. *See* paragraphs 7-9.

VI. PROCEDURAL MATTERS

19. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

20. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte*, or otherwise, are permitted

unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

21. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of the same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

22. Authority for issuance of this *Notice* is contained in Section 4(i) 303(f) and (r) of this Communication Act of 1934, as amended, 47 U.S.C. § 154(i), 303(f) and (r). Under procedures set out in Section 1.415 of the Rules and Regulations, 47 C.F.R. § 1.415, interested persons may file comments on or before **March 29, 1990** and reply comments on or before **April 13, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order*.

23. In accordance with the provision of Section 1.419 of the Rules and Regulations, 47 C.F.R. § 1.419, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 9 copies. Members of the general public who wish to express their comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room (Room 239) at its headquarters in Washington, D.C.

24. IT IS ORDERED that a copy of this *Notice* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended, as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.203, the first sentence of paragraph (a) is revised, paragraphs (c) through (k) are redesignated as paragraphs (d) through (l), and a new paragraph (c) is added to to read as follows:

§ 80.203 Authorization of transmitters for licensing.

(a) Each transmitter authorized in a station in the maritime services after September 30, 1986, except as indicated in paragraphs (g), (h) and (i) of this section, must be type accepted by the Commission for Part 80 operations. * * *

* * * * *

(c) Effective August 1, 1992, all VHF ship station transmitters capable of operation in the 156-162 MHz band that are either manufactured in or imported into the United States, or are installed on or after August 1, 1993, must be equipped with an automatic timing device that deactivates the transmitter after an uninterrupted transmission period in excess of three minutes and a device that indicates when the automatic timer has deactivated the transmitter. VHF ship station transmitters installed before August 1, 1993, are authorized for use indefinitely at the same maritime station.

* * * * *

FOOTNOTES

[1] *See Generally,* FY-88 Boston Marine Safety Project Report (November 4, 1988); FY-87 Regional Marine Safety Project Report (January 26, 1988). Both studies can be found at the Commission Library.

[2] The USCG usually does not request assistance until the interfering signal exceeds fifteen minutes duration.

[3] Petition at 1.

[4] *Id.*

[5] *Id.* at 2.

[6] *See,* for example, Section 90.243 (c)(4), 47 C.F.R. § 90.243(c)(4).

[7] We note that many coast stations use VHF transmitters authorized for both coast station and ship station use. Because these transmitters could be used aboard ship they would be subject to the requirements proposed herein.

[8] If there are duplex channels used internationally that use a continuous carrier for communications our proposal would limit those two-way communications to three minutes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and
Telegraph Company

Comparably Efficient
Interconnection Plan for Protocol
Conversion and Storage Services
with Packet Switching Services

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1990; Released: February 2, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 23, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] the American Telephone and Telegraph Company (AT&T) filed a Comparably Efficient Interconnection (CEI) Plan for enhanced packet switching services involving protocol conversion and information storage. Telenet Communications Corporation (Telenet) filed comments on the Plan, and AT&T filed a reply. In this Order, we approve the Plan.

II. SERVICE DESCRIPTION

2. AT&T requests authority to provide enhanced protocol conversion and storage services in connection with two of its X.25-based packet switching services.[2] AT&T states that its protocol conversion service will involve the processing of "protocol-related symbols" appearing in transmitted information, and conversion between customers' protocols and the X.25 protocol used by AT&T's packet switched services. [3] AT&T will initially convert the following protocols to X.25: asynchronous, bisynchronous (BSC) RJE 2780/3780, BSC 3270, and SNA/SDLC.[4] AT&T adds that its storage offering is an optional capability of the protocol conversion service that will permit end users to interact with customer-specific information stored in the network.[5] AT&T notes that numerous competitors offer similar enhanced packet switching services.[6]

3. AT&T will use packet/assembler/disassembler (PAD) equipment collocated in its central office to provide the enhanced packet switching services.[7] AT&T states that the basic services underlying the enhanced packet services are ACCUNET Packet Service (APS) and Private Packet Network Service (PPNS).[8] APS is a "tariffed common user network service that provides for the switching and transmission of data or packets."[9] APS allows users to share transmission lines and switches priced on the basis of usage, thus eliminating the need to subscribe to dedicated interswitch trunks.[10] PPNS provides "for the switching of data packets" with PPNS customers procuring dedicated interswitch trunks instead of sharing interswitch trunks as APS customers do.[11] AT&T states that customers will be able to obtain synchronous and asynchronous access to the PAD through dedicated facilities and dial-up services at various transmission speeds.[12]

III. CEI REQUIREMENTS

A. Unbundling of Basic Services

4. The Commission's CEI parameters require that AT&T unbundle the basic service functions underlying its enhanced services from other basic service offerings.[13] AT&T states that its Plan complies with this requirement since its enhanced packet services will use AT&T tariffed basic services, including APS, PPNS, DATAPHONE Digital Service (DDS), and Voice Grade Service, for underlying transport, and all of these services are unbundled from other basic services and offered separately pursuant to tariff.[14]

5. Telenet argues that APS is not the appropriate basic service for purposes of this proposal.[15] It also contends that "APS should be priced to recover the tariffed rates, rather than the embedded cost, of the underlying DDS facilities used in providing that service."[16] Telenet states that APS is used "almost entirely for AT&T's internal communications and in support of AT&T's other enhanced services."[17] Telenet adds that this usage will only increase as a result of AT&T's offering of enhanced packet services.[18] Thus, Telenet argues that the Commission must face the question of whether "a purportedly general offering might in fact be a vehicle for subsidizing an unregulated affiliate's offering of enhanced services."[19] Telenet also contends that AT&T's pricing of APS on the basis of embedded cost subjects competitors to a "price squeeze."[20]

6. In addition, Telenet challenges the Commission's decision to treat AT&T and BOC provision of enhanced packet services differently for purposes of the unbundling requirement due to the fact that AT&T's basic service offerings are subject to competition while basic BOC services are not.[21] Telenet argues that "the digital offerings of MCI and Sprint continue to lack the ubiquity of DDS."[22] Telenet also contends that the general requirement that an enhanced service provider pay tariffed rates for use of its own transmission capacity is designed to prevent cross-subsidization of enhanced services and discrimination, and is not based on the monopoly characteristics of the basic services involved.[23] Telenet also contends that AT&T does not provide sufficient detail concerning its proposed use of PPNS, and expresses concern that PPNS may be another "vehicle for the cross-subsidized entry by AT&T into the fully integrated enhanced packet switching market."[24]

7. AT&T contends that Telenet has raised the same arguments concerning APS unsuccessfully in numerous prior proceedings,[25] adding that the Commission has expressly upheld AT&T's use of APS as "a basic service for collocated AT&T enhanced offerings."[26] AT&T argues that Telenet fails to raise new facts or arguments that warrant reversal of this policy. AT&T also contends that there is no basis for Telenet's claims that APS has been subsidized by other AT&T services and might be used to subsidize AT&T's enhanced packet offerings.[27] AT&T states that "APS revenues, investments, and expenses are maintained 'below-the-line'"[28] and that "APS, standing alone, is profitable."[29] AT&T adds that Telenet's concerns about the

use of PPNS as a basic service are unfounded because PPNS is a "switching service only" and thus does not raise the unbundling issue.[30]

8. In the *AT & T ONA Order*, the Commission held that AT&T could treat APS as a basic underlying service and satisfy its CEI obligations by offering APS to others at tariffed rates without further unbundling.[31] In that Order, the Commission also noted that it had previously found that APS was appropriately priced in relation to DDS.[32] The Commission affirmed these conclusions in the context of AT&T's CEI Plan for Transaction Services.[33] Telenet has not cited any considerations that would justify a change in this policy. Accordingly, we find that AT&T's proposal to offer APS to others at the same tariffed rates available to its enhanced service operations satisfies the CEI requirements concerning unbundling of underlying basic services.

B. Other CEI Requirements

9. AT&T also describes how it will comply with the other CEI parameters described in the *Phase I Order*.[34] AT&T states that it will not use any basic service functions for its enhanced packet services that are not "specified in and available through AT&T's tariffs."[35] AT&T adds that its enhanced services will purchase underlying basic services at the tariff rates.[36] In addition, AT&T states that all underlying basic services will be available to ESPs and all other users at the same time without restrictions based on the identity of the user.[37] Furthermore, AT&T states that all service features available for use with its enhanced packet services are available under tariff to all end users on the same terms and conditions.[38]

10. AT&T also states that its enhanced packet services will use AT&T's tariffed services, with the same technical characteristics available to competing ESPs.[39] AT&T adds that interconnection to its enhanced protocol processing service will be through the same standard network interfaces which are currently available to other users of the underlying basic services.[40] AT&T adds that it will use the installation, maintenance and repair procedures that the Commission approved in ruling on AT&T's ONA Plan.[41] AT&T also states that it has taken steps to minimize local transport costs for competing ESPs insofar as possible.[42] AT&T adds that it has satisfied the Commission's CEI pricing requirements to the extent relevant.[43]

11. In addition, AT&T describes how it will comply with the other nonstructural safeguards established in the *Phase I Order*.[44] AT&T states that it will identify the costs of its enhanced packet services pursuant to its cost allocation manual approved by the Commission.[45] AT&T also states that it will satisfy the Customer Proprietary Network Information (CPNI) requirements in the manner described in its approved ONA Plan.[46] AT&T further states that it will comply with the Commission's network information disclosure requirements if any changes in its basic network affecting the interconnection of enhanced services reaches the make/buy point, although its Plan does not propose any changes to existing network interfaces.[47] In addition, AT&T states that it will continue to submit an annual affidavit attesting that it has not "discriminated in the quality of basic service applications,"[48] and will follow the comparative installation and maintenance interval reporting requirement.[49]

12. No one filed comments concerning AT&T's compliance with these CEI parameters, the CEI pricing requirements, and the other nonstructural safeguards. Based on the information presented by AT&T, we approve AT&T's CEI Plan for protocol conversion and storage services with packet switching services, described herein, finding that AT&T has shown that it will comply with the applicable safeguards.[50]

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, AT&T's CEI Plan for protocol conversion and storage services with packet switching services described herein, IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *appeals pending sub nom.* California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[2] Plan at 1.

[3] *Id.* at 2.

[4] *Id.* AT&T states that it may offer additional protocol conversions in accordance with this Plan in the future. *Id.* at 2, n.*.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 3. AT&T states that in the case of central offices where PPNS or APS are not available, it may transport the packet traffic to the nearest central office where PPNS or APS is available using either DATAPHONE Digital Service or Voice Grade Service. *Id.* at n.*.

[8] *Id.*

[9] *Id.* Both APS and PPNS are offered pursuant to tariff. *Id.* AT&T's PPNS tariff became effective on June 30, 1989.

[10] *Id.*

[11] *Id.* Customers obtaining the transmission capacity for use with PPNS from AT&T would take service pursuant to tariff. AT&T Reply at 4.

[12] Plan at 4.

[13] *Phase I Order*, 104 FCC 2d at 1040.

[14] Plan at 6.

[15] Telenet Comments at 2.

[16] *Id.* at 3.

[17] *Id.* at 3. Based on an analysis of AT&T's January 1987 semi-annual report concerning APS, Telenet concludes that "less than 25% of APS' revenues -- and less than 15% of the total usage of the APS network -- was attributed to non-AT&T-affiliated customers." *Id.* at 3-4.

[18] *Id.* at 5.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 6.

[22] *Id.*

[23] *Id.* at 7.

[24] *Id.* at 9.

[25] AT&T Reply at 2 and 3-4.

[26] *Id.* at 3.

[27] *Id.*

[28] *Id.* at 4, n. *.

[29] *Id.*

[30] *Id.*

[31] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase II, 4 FCC Rcd 2449 at 2454 (1988).

[32] *Id.*

[33] Application for Review of the Common Carrier Bureau's Approval of AT&T's CEI Plan for Transaction Services, 4 FCC Rcd 4544 at 4545 (1989).

[34] *Phase I Order*, at 1039-1057.

[35] Plan at 5.

[36] *Id.* at 7.

[37] *Id.* at 11. AT&T notes that APS, DDS and Voice Grade Service have been available under tariff for years. *Id.*

[38] *Id.*

[39] *Id.* at 8.

[40] *Id.*

[41] *Id.* at 9-10.

[42] *Id.* at 12-13.

[43] *Id.* at 13-15.

[44] *Phase I Order* at 1043-1057.

[45] Plan at 16.

[46] *Id.*

[47] *Id.* at 17.

[48] *Id.* at 18.

[49] *Id.*

[50] Consistent with our past orders concerning protocol processing CEI plans, AT&T is free to provide additional protocol conversions without further regulatory approval as long as it provides the additional protocol conversions in full compliance with the terms of this Plan.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter Of

ALASCOM, INC.

Request for Ratemaking
Recognition of an
Antitrust Settlement

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1990; Released: February 2, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Alascom Inc., by letters dated July 19, 1988 and October 25, 1989, has requested that the Commission recognize for interstate ratemaking purposes a settlement payment incurred in an antitrust action between General Communication, Inc. (GCI) and Alascom. For the reasons stated below, we conclude that Alascom may include only part of the settlement payment in its interstate revenue requirement.

II. BACKGROUND

2. The Commission has authority, under the Communications Act of 1934, to prescribe the manner in which carriers account for the expenditures which they incur.[1] Although the Commission's Uniform System of Accounts (USOA) provides comprehensive instructions for recording expenses, the Commission has been called upon recently to clarify the accounting and ratemaking treatment of certain litigation costs. Alascom's request presents the first opportunity for us to determine, under the Commission's guidelines, the extent to which a carrier may pass on to ratepayers a payment made to satisfy an antitrust settlement reached before an adverse judgment.

3. In the recent Rule Making proceeding addressing the questions presented here[2], the Commission determined that all antitrust settlements would be accounted for in the USOA in a nonoperating expense account. [3] The Commission stated that expenditures resulting from antitrust settlements are not ordinary expenses for ratemaking purposes and should not be passed on to the ratepayer, absent justification.[4] However, the Commission recognized that under some circumstances, *i.e.*, when it is in the ratepayers' best interests, a carrier may be justified in recovering the settlement through the ratemaking process. Therefore, the Commission set forth general guidelines for carriers seeking to recover the settlement payment from ratepayers:

> A carrier . . . must show the basic factors that induced the carrier to settle, such as the cost of continuing the litigation, the burden of the defense on the company, significant rulings by the court that are adverse to the plaintiff's case, and other factors routinely quantified in litigation risk analyses. Finally, the carrier must demonstrate the benefit to ratepayers.[5]

The Commission thus determined that if the carrier is able to show that these factors were significantly beneficial to the ratepayers, it may argue that it should recover the settlement from ratepayers.

4. Several parties filed petitions for reconsideration of the *Litigation Costs Order*, addressing, in part, the question of when settlement payments should be borne by ratepayers. In response to these concerns about the general nature of the guidelines quoted above, in the *Litigation Costs Recon. Order*, the Commission clarified those guidelines. The Commission determined that a portion of a pre-judgment settlement payment was presumptively recoverable from ratepayers.[6] That amount considered presumptively recoverable:

> is the amount corresponding to the additional litigation expenses, expressed in present value terms, which the carrier reasonably estimates it would have paid if it had not settled and which the carrier would have allocated to the interstate jurisdiction... If the carrier establishes that a reasonable estimate of the present value of its saved litigation expenses allocable to the interstate jurisdiction is equal to or greater than the settlement payment, then the entire settlement is presumptively recoverable in its rates.[7]

If the saved litigation expenses are less than the settlement payment, the carrier may argue for recovery of the difference. However, the carrier does not receive the benefit of the presumption of recovery on the difference.[8] The Commission stated that the guidelines detailed in the *Litigation Costs Recon. Order* are a proper balance for determining which settlement payments are not ordinary expenses recoverable from ratepayers, while also encouraging cost-saving settlements of unfounded claims. The guidelines also continue to promote the "benefit to ratepayers" standard established in the *Litigation Costs Order*.[9]

III. ALASCOM'S LETTERS AND RELATED PLEADINGS

5. On May 14, 1988, Alascom, GCI, and American Telephone and Telegraph Co. (AT&T) entered into a settlement agreement resolving an antitrust suit filed by GCI.[10] The agreement called for a settlement payment of $27.5 million to GCI, with $17.5 million contributed by Alascom and $10 million contributed by AT&T.[11] In its July 1988 letter, Alascom informed the Commission of its intent to enter the settlement payment in an operating expense account, account 6725, and stated that the cost of the settlement should be borne by ratepayers. Alascom's July 1988 letter offered five basic reasons for including the settlement payment in its revenue requirement: (1) reduced uncertainty and normalized business relationships, (2) avoidance of estimated litigation expenses in excess of ten million dollars, (3) elimination of a major distraction and diversion of company resources, (4) settlement with a strong and successful defense available, and (5) exemplification of prudent business judgment by settling for nuisance value.

6. AT&T, by letter dated August 5, 1988, opposed Alascom's accounting and ratemaking treatment of the settlement. AT&T disputed several of Alascom's contentions. AT&T contended that Alascom did not sufficiently justify recognition of the settlement for ratemaking because the settlement: (1) was not merely for nuisance value and (2) did not normalize business relations between the two parties. AT&T also stated that its payment of $10 million was no vindication of Alascom's position at trial. AT&T thus claimed that Alascom failed to satisfy its burden, established in the *Litigation Costs Order*, of showing that the settlement cost should be borne by the ratepayers.

7. Alascom, in its August 17, 1988 reply, reiterated its original position, and contended that AT&T offered no rebuttal to any of its projected costs for continued litigation, nor to the fact that Alascom settled for less than the total potential verdict sought by GCI. Alascom also argued that AT&T's contentions about settling for greater than nuisance value were invalid and should be disregarded.

8. By letter dated September 14, 1988, the Chief, Accounting and Audits Division, informed Alascom that the settlement payment must be recorded in account 7620 in order to comply with the *Litigation Costs Order*.[12] In the same letter, the Chief, Accounting and Audits Division, informed Alascom that a decision on the request for ratemaking recognition would be forthcoming after review of all information then submitted.

9. Prior to the issuance of a decision on the ratemaking issue, the Commission released the *Litigation Costs Recon. Order*. The Chief, Accounting and Audits Division, then invited Alascom to provide any further information pursuant to the criteria set forth in the *Litigation Costs Recon. Order*.[13]

10. After the release of the *Litigation Costs Recon. Order*, Alascom submitted further details of its estimated savings from discontinuing litigation in an attempt to gain the benefit of the presumption of recovery. Alascom divided its saved additional litigation costs from settlement into four categories: (1) external expenses, (2) internal expenses, (3) additional expenses, and (4) retrial expenses. Alascom calculated these expenses to be approximately $21,957,273. Because its estimation of saved litigation costs exceeded the settlement payment, Alascom asked for full recovery of the settlement from the ratepayers.[14]

11. Alascom also claimed that it fulfilled its burden of showing that the settlement benefitted ratepayers, consistent with the guidelines established in the *Litigation Costs Order*. Moreover, Alascom offered an additional factor, the cost of leasing satellite capacity, which it purportedly considered in deciding to settle. Alascom stated that the Commission should consider the costs associated with this factor in allowing full settlement costs to be borne by the ratepayers.[15]

12. AT&T, by letter dated November 6, 1989, stated that it did not oppose Alascom's partial recovery of the settlement. AT&T would allow recovery of all external expenses, appeals costs, employees' nonsalary expenses, and in-house counsel costs for trial and appeal, totalling an estimated $6,187,530. AT&T concluded that these costs were presumptively recoverable under the *Litigation Costs Order*. However, AT&T argued that no other costs submitted by Alascom are recoverable under either the presumption of recovery or the guidelines established in the *Litigation Costs Order*.

13. Alascom, by letter dated November 21, 1989, replied to AT&T's letter regarding what settlement costs were recoverable. Alascom again argued that the salaries and benefits of employees who worked on the antitrust action, a supersedeas bond, and the cost of proceedings related to the antitrust action (collateral proceedings) were presumptively recoverable expenses. Alascom stated that inclusion of internal costs (salaries and benefits) in the presumptively recoverable category would not, as AT&T claimed, be double recovery, because the employees involved could not do their normal work and thus it would have been required to hire more people or allow the work to go undone. Alascom also stated that its estimated retrial, plaintiff's legal fees, and leasing expenses were recoverable because they were valid factors in its litigation risk analysis, which is a key component in determining the recovery of settlement payments. Finally, Alascom contended that the equitable factors it presented in its two previous letters (reduced uncertainty in its financial and investment future, normalized business relationships, elimination of a major distraction and diversion of company resources, settlement with a strong defense and a prudent business decision) were of significance, and therefore, supported its view that the entire settlement payment was recoverable.

IV. DISCUSSION

A. *Presumptively Recoverable Costs*

14. The Commission's stated policy is to place the cost of litigation settlements upon the carrier, not the ratepayer, unless the carrier shows sufficient justification.[16] The Commission has stated that a carrier may be able to justify recovery of settlement from the ratepayers in two ways. First, a carrier who settles a case before entry of an adverse judgment may presumptively recover the amount of saved litigation expenses, expressed in present value terms, which is allocable to the interstate jurisdiction.[17] If the settlement is less than the estimated litigation expenses, the carrier may recover the entire settlement amount. However, a carrier may include that portion of a settlement payment representing saved litigation expenses only when there is adequate support making it reasonably certain that, without settlement, the estimated expenses would have been incurred.[18] Second, if the settlement is greater than the saved expenses, the carrier must justify recovery of the difference without the benefit of a presumption by using the guidelines established in the *Litigation Costs Order*.[19] After reviewing the material before us, we are unable to find that the full settlement payment made by Alascom is presumptively recoverable.

15. The presumption of recovery allows only the recovery of saved litigation costs.[20] Although the Commission did not specifically define saved litigation costs, it stated that the presumption would facilitate recovery of settlements in cases that the parties settle for the "nuisance value" of the suit.[21] The "nuisance value" criterion in turn means that only those costs which would have been incurred by Alascom in the event of an initial favorable verdict are included in the presumption of recovery. After reviewing the expenses listed by Alascom as saved litigation costs, we find that only external costs of attorneys fees, travel costs, expert fees, and transcript costs, and internal costs of employees' travel costs (a total of $5,740,650) are presumptively recoverable.[22] As discussed

below, these costs are presumptively recoverable because they are: (1) the direct costs of litigating a case, (2) reasonably certain in amount, (3) properly documented by those that Alascom would have paid, and (4) based solely on litigating the court proceeding to an initial favorable decision. However, the estimation by Alascom does not take into account the present value and interstate allocation requirements. Before Alascom can recover this portion of the settlement from its ratepayers, it must make these adjustments.

B. ***Alascom's Estimated Presumptively Recoverable Costs Not Allowed***

16. As we noted above, only saved litigation costs which would have been incurred, absent settlement, are presumptively recoverable from ratepayers.[23] Also, as noted above, these costs must be associated with a favorable verdict.[24] We find that Alascom's estimated costs of a supersedeas bond, plaintiff's legal fees, and retrial expenses are not costs associated with a favorable verdict; therefore, such costs must be excluded from the presumption of recovery. Alascom estimated that these costs, absent settlement, would exceed $13 million.[25]

17. Alascom also estimated additional saved costs, pertaining to certain collateral proceedings and in-house counsel replacement, that could be associated with a finding of a favorable verdict. However, we are not including those costs in those that are presumptively recoverable in this case. Although the Commission did not specifically define the boundaries of "saved litigation costs", we believe the Commission contemplated only those costs which would have been incurred as a direct result of the settled action.[26] That is, the costs must include only those costs avoided by the settlement. In making this showing the carrier must establish with reasonable certainty that the costs would have been incurred. Also, as to collateral proceedings, we believe that presumptive recovery is possible only if the issues in the collateral proceeding were determinative of the issues in the subject proceeding. As discussed below, we conclude that the estimated saved litigation costs associated with certain collateral proceedings and in-house counsel replacement do not meet these tests.[27]

18. The first collateral proceeding, a declaratory ruling brought by GCI against AT&T in an Alaska state court, involved issues regarding the provisions of the AT&T-GCI settlement agreement. Alascom became a party only after AT&T joined it as a third party defendant. Under the standards enunciated above, these costs fail to meet the "determinative issues" criterion. Alascom did not provide sufficient proof that the issues involved in the two actions were similar. In fact, Alascom includes in its October 1989 letter evidence that GCI contended that the declaratory ruling action involved issues "separate and distinct".[28] As a result, we find that the costs associated with the declaratory ruling are not costs which would have been incurred as a direct result of the settled antitrust action.

19. We also will not allow recovery for the estimated saved litigation costs associated with the second collateral proceeding, an action brought before the Alaska Public Utilities Commission (APUC) dealing with intrastate traffic questions. Although the issues involved in the APUC proceeding were a direct result of the counterclaim in the antitrust action, the costs allegedly avoided in litigating that proceeding were not directly related to the settlement reached in the antitrust proceeding.[29] The allegedly foregone costs of the APUC proceeding might well have been avoided without regard to the negotiations in the court proceeding. Moreover, even if we found that the issues in the two proceedings were so closely related that resolution of one case necessarily resolved the other, it would not be proper in this case to allow presumptive recovery of the costs of the APUC proceeding from the interstate ratepayers. The APUC proceeding involved a state regulation question (whether GCI was unlawfully providing intrastate service in Alaska and what relief was required). This is not the type of proceeding whose costs should be included in the presumption of recovery from interstate ratepayers.[30]

20. We do not allow, for purposes of determining saved litigation expenses, Alascom's claimed costs of $858,040 for replacement of in-house counsel during the trial. Although such an estimated cost might be included in the presumptively recoverable costs in some circumstances, Alascom has not shown that it is reasonably certain that, without settlement, it would have incurred costs of this magnitude. First, we note that Alascom does not provide any specific information that it had made any arrangements with outside counsel to provide normal business and legal services during the trial. Because Alascom settled after the trial had begun, surely it would have actually made those arrangements (and documented them in its October 1989 letter) if the costs were "reasonably certain". Moreover, Alascom stated (and we accept this as true) that its trial and appeal costs would include expenses of 17 outside attorneys and 8 paralegals. Given this level of outside effort in the trial, it is not certain that Alascom would have incurred in-house counsel replacement costs of the magnitude claimed. In summary, we find that Alascom's justification of this claimed litigation cost is speculative. As the Commission has noted, "[i]nadequately supported estimates will not be accepted."[31]

21. As noted above, the Commission has stated that "[c]arriers must accompany their requests for recovery of any portion of a settlement with reasonable support for their estimate of saved litigation expenses."[32] We find that Alascom has failed to provide "reasonable support" for the inclusion of its estimated "internal costs" as saved litigation costs. Although Alascom provides a chart listing employee costs related to the antitrust litigation, it has failed to provide sufficient support for why these costs are saved litigation costs. Alascom states that "additional hours of management and employee time and related resources would have been expended in further litigation".[33] However, Alascom does not describe whether these "additional hours" are employee overtime or opportunity costs to Alascom.[34] If they are the former, then they might be claimed as presumptively recoverable upon a sufficient showing (which Alascom does not provide). However, if they are the latter, they are not presumptively recoverable. We deny presumptive recovery of opportunity costs because they are outside the realm of our boundaries for saved litigation costs.[35]

22. Finally, Alascom suggests that, under the *Litigation Costs Recon. Order*, indirect costs and equitable arguments are to be considered for recovery of settlements. We agree that under the appropriate circumstances such factors may be persuasive enough to allow the carrier the opportunity to include the settlement in its revenue requirement. However, these are not factors to be considered under the presumption of recovery; rather they are to be

considered under the general guidelines of the *Litigation Costs Order*. Those factors are addressed in the following paragraphs.

C. ***Factors Considered in Allowing Recovery of Additional Settlement Costs***

23. As stated in the *Litigation Costs Order*, the general standard for allowing recovery of settlement payments is "benefit to the ratepayers".[36] Although the Commission suggested only one type of settlement which is of "benefit to the ratepayer", namely, settlements for "nuisance value" or "saved litigation costs", it also stated that settlements reached under other circumstances may be included in the revenue requirement in very limited cases.[37] As noted in paras. 15 - 21, *supra*, we have determined that Alascom settled the antitrust action for an amount that exceeds its saved litigation costs. Accordingly, we must look to the other considerations set forth in the *Litigation Costs Order* to determine whether Alascom may recover any amount of the settlement payment beyond that which is presumptively allowed in para. 14, *supra*.

24. In addition to its estimated saved litigation expenses, Alascom's October 1989 letter states that the settlement payment was a "benefit to ratepayers" because it: (1) eliminated a major distraction of and drain on company resources, (2) was reached with a strong and successful defense available, and (3) was reasonable considering other specific factors. We believe that Alascom's claim that the settlement removes a burden from management and employees is credible, and the quantified internal costs associated with settlement are not unreasonable. However, these claims are true of any settlement, and Alascom does not show any unique circumstances in this regard. Without more, we find these factors not adequate to warrant ratemaking recognition of the entire settlement payment.

25. Alascom argues that the various pretrial rulings were in its favor, and therefore, no implication can be drawn that it settled to avoid losing the suit. However, as AT&T noted, rulings by this Commission on matters referred to it by the District Court are mixed, and provide some indication that Alascom was not without fault. For example, the Commission found that Alascom knowingly and unlawfully discriminated, in violation of section 202(a) of the Communications Act, by charging GCI intrastate rates for interstate service, while charging its own customers the lower interstate rate for the same service.[38] Alascom and AT&T make generalized arguments about whether and to what extent rulings by the trial court were favorable to Alascom. However, lacking specific information about what issues were originally in the suit, which have been resolved, which still remained to be tried, and how the resolution of any issues might affect potential damages, we are unable to reach any conclusion favorable to Alascom regarding the significance of pretrial rulings.

26. Alascom also claims that, considering other factors (normalized business relationships, ability to pursue investment opportunities without the uncertainties engendered by the antitrust action, potential litigation costs as analyzed in its litigation risk analyses and use of good business judgment), the settlement was reasonable and a benefit to the ratepayers. We are not in a position to determine that ending this action will reduce the adversarial character of the relationships between the parties, and normalize business relationships. In fact, AT&T states in its August 1988 reply that Alascom's request for settlement recovery is hardly conducive to normalizing the relationship between the two since AT&T would bear a large portion of the cost of the settlement payment if Alascom recovers from the ratepayers.[39] AT&T also contends that critical market structure issues remain before the Alaska Joint Board and the Alaska Public Utilities Commission involving AT&T and Alascom, again in adversarial roles. Although the settlement appears to have removed one obstacle in the path of normalized business relationships between the parties, other problems apparently remain unsolved. Thus, we do not find this claimed benefit to be significant in determining the recovery of the settlement payment.

27. Alascom claims that the settlement benefitted the ratepayers because it allowed Alascom to pursue beneficial investment opportunities. For example, Alascom states that its present satellite would need to be replaced during the litigation period, but that leasing (rather than purchasing) would be the only viable option during that period. Alascom argues that leasing costs would exceed the costs of purchasing by $20 million, resulting in a less beneficial investment decision. However, Alascom offers no evidence that the antitrust action would impede its purchase of a satellite, except that its "financial and operational future" was uncertain.[40] This "cost" not only is highly speculative and remote, but also reflects Alascom's fear of adverse judgment, which, if anything, weighs against recovery from ratepayers. Alascom also claims that it would have had to forego investment in a fiber optic cable spur because of the constraints of the antitrust action. Again, Alascom fails to offer evidence that the action would impede this investment, except that it could not invest "under the constraints of the antitrust litigation."[41] Thus, we find these factors insignificant in determining the ratemaking treatment of the settlement payment.

28. We have also considered Alascom's assertions that the avoidance of potential litigation costs is considered in any litigation risk analysis, and that Alascom therefore should be able to recover the full settlement payment because litigation risk analysis is a key component in determining the extent of settlement costs.[42] It is true that the Commission did state that a carrier seeking recovery of a settlement should show quantified factors considered in litigation risk analysis.[43] However, the Commission never stated that all costs associated with such factors were recoverable. Costs anticipating an adverse judgment are factored into litigation risk analysis, and doubtless influenced Alascom's settlement payment. However, we will not routinely allow recovery of such costs without compelling evidence of benefit to ratepayers.[44] We conclude that, in view of all the facts surrounding this litigation, Alascom has offered no compelling evidence supporting recovery, under the general guidelines of the *Litigation Costs Order*, of the costs of plaintiff's legal fees, the supersedeas bond, and retrial. An equitable resolution of this matter provides no compelling reason to impose on ratepayers additional costs that are grounded on an adverse decision.[45]

29. Finally, Alascom argues that settlement was beneficial to the ratepayers because it was a good business decision, citing the fact that it settled for less than one-third of the potential damages. We are unwilling to allow the balance of the settlement payment on the basis of this asserted justification. Presumably, every carrier that settles a proceeding considers itself to have made a "good busi-

ness decision." If settlement costs could be imposed on ratepayers for this reason, the policy that the Commission has carefully crafted would be rendered meaningless.

V. ORDERING CLAUSE

30. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 201-205 and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201-205 and 220, Alascom's request for ratemaking recognition of the settlement payment IS GRANTED to the extent set forth above, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See generally* 47 U.S.C. §220.

[2] Notice of Proposed Rule Making to amend Part 31 Uniform System of Accounts for Class A and Class B Telephone Carriers to Account for Judgments and Other Costs Associated with Antitrust Lawsuits, and Conforming Amendments to the Annual Report Form M, *Report and Order*, 2 FCC Rcd 3241 (1987) (*Litigation Costs Order); recon.*, 4 FCC Rcd 4092 (1989) (*Litigation Costs Recon. Order);* appeal pending *sub nom.*, Mountain States Telephone & Telegraph Co. v. FCC, Case No. 89-1421 (D.C. Cir., filed July 7, 1989).

[3] *Litigation Costs Order*, 2 FCC Rcd at 3245 and 3247. The *Litigation Costs Order* required carriers to record settlement payments in account 7620. The Commission later found that the appropriate Part 32 account was account 7370. *See Litigation Costs Recon. Order*, 4 FCC Rcd at 4099.

[4] *Litigation Costs Order*, 2 FCC Rcd at 3245.

[5] *Id.* at 3246.

[6] *Litigation Costs Recon. Order*, 4 FCC Rcd at 4097.

[7] *Id.*

[8] *Id.*

[9] *Litigation Costs Order*, 2 FCC Rcd at 3246. The *Litigation Costs Recon. Order* states that settlements which are reached for their "nuisance value", that is, their saved litigation costs, are the type of settlements which do benefit the ratepayers. *Litigation Costs Recon. Order*, 4 FCC Rcd at 4098.

[10] GCI v. Alascom, Case No. C84-523 (W.D. Wash., filed April 24, 1984).

[11] AT&T and GCI reached a settlement agreement in 1985. However, AT&T remained a party to the action because of Alascom's counterclaim against AT&T and GCI based on their settlement agreement. In the subject settlement, AT&T agreed to pay $10 million to Alascom on its counterclaim, and Alascom agreed to contribute that amount to GCI. The net result was a settlement payment by Alascom of $17.5 million on GCI's antitrust action.

[12] *Litigation Costs Order*, 2 FCC Rcd at 3245. In the *Litigation Costs Recon. Order*, the Commission changed the account for settlement payments to account 7370. *See supra* at n. 3.

[13] Letter from Kenneth P. Moran, FCC, to Gary M. Epstein, counsel for Alascom, dated September 19, 1989.

[14] A detailed summary of Alascom's arguments in this area is set forth in the Discussion section below.

[15] Because of financial uncertainties during the litigation period, Alascom argued that it would have foregone launching a new satellite during the litigation period, and, instead, would have leased satellite capacity, costing an additional $20 million.

[16] *Litigation Costs Order*, 2 FCC Rcd at 3245.

[17] *Litigation Costs Recon. Order*, 4 FCC Rcd at 4097.

[18] *Id.* at 4098.

[19] *Id.* at 4097-98.

[20] For convenience, we refer to the presumption in terms of saved litigation costs only. However, as noted above, the presumption requires those costs to be expressed in terms of present value, allocable to the interstate jurisdiction.

[21] *Litigation Costs Recon. Order*, 4 FCC Rcd at 4098.

[22] The presumptively recoverable estimated costs are:

External Costs	
Legal Fees:	
Trial-	$2,841,000
Appeal-	$500,000
Travel Costs:	$258,000
Transcript/Services Costs:	$100,000
Expert Fees	$1,550,000
Internal Costs	
Travel Costs:	$435,650
Transcript/Services Costs:	$56,000
TOTAL	$5,740,650

[23] *See supra* at n. 18.

[24] *See supra* at n. 21.

[25] The estimated cost of each item is as follows:

Supersedeas Bond:	$638,500
Plaintiff's Legal Fees:	$8,300,000
Retrial Expenses:	$4,611,559
TOTAL	$13,550,059

See Alascom's October 1989 letter at 9-16.

[26] Thus, a "saved litigation expense" must have a direct relationship with the settled litigation, not merely a causal relationship.

[27] The estimated cost of each item is as follows:

Collateral Proceedings-	
Declaratory Ruling:	$384,380
Intrastate Traffic:	$902,470
In-House Counsel Replacement-	
Trial and Appeal:	$446,880
Retrial and collateral proceedings:	$411,160
TOTAL	$2,144,890

See Alascom's October 1989 letter at 13-15 and 10.

[28] *Id.* at Exhibit A, p. 4. Moreover, AT&T, in its November 1989 letter, states that it impleaded Alascom only because of the potential that the two actions "might well have overlapped". AT&T's November 1989 letter at 6.

[29] Alascom states that the negotiations between Alascom and GCI in the APUC proceeding merely "intensified" after the settlement of the antitrust action. Alascom's October 1989 letter at 14.

[30] *Litigation Costs Recon. Order*, 4 FCC Rcd at 4097.

[31] *Id.* at 4098. Moreover, even if we concluded that Alascom's estimates were adequately supported, we could allow only that portion of in-house counsel replacement costs associated with the trial and appeal. In paras. 17-20 *supra*, we rejected Alascom's recovery of retrial and collateral proceedings costs. Thus, even if we were to agree that in-house counsel replacement costs are recoverable in this case, we would not allow those costs to the extent that they are related to retrial and collateral proceedings.

[32] *Id.* The Commission also stated that "we will permit a carrier to include the portion of a settlement payment representing saved litigation expenses in its revenue requirement when the carrier presents material adequate to make it reasonably certain that, absent a settlement, it would have incurred the expenses it estimates." *Id.*

[33] Alascom's October 1989 letter at 8.

[34] Alascom states in its November 1989 letter that it "hired additional people" to keep functioning. Alascom's November 1989 letter at 3. However, Alascom does not provide any specific expenses associated with the costs of these additonal people.

[35] As AT&T noted in its November 1989 letter, salaries and benefits must be paid to Alascom employees, regardless of the settlement. Also, these costs to Alascom are already recoverable from ratepayers as ordinary expenses, and we will not allow double recovery of these expenses from the ratepayers.

[36] *Litigation Costs Order*, 2 FCC Rcd at 3246.

[37] *Id.*

[38] *See* Arctic Slope Wright Schuchart and General Communication Incorporated v. Alascom, Inc., *Memorandum Opinion and Order*, Mimeo No. 3627, released April 4, 1985. The Commission determined that this order was "good law" and served as "Commission precedent" with respect to issues which could be similar in the antitrust action between Alascom and GCI. Referral of Questions from General Communication Incorporated vs. Alascom, Inc. in the United States District Court for the Western District of Washington, *Memorandum Opinion and Order*, 3 FCC Rcd 700, 707 (1988).

[39] AT&T's August 1988 letter at 8.

[40] *See* Alascom's October 1989 letter at 15.

[41] *Id.* at n. 6.

[42] Alascom's November 1989 letter at 3, 5-6.

[43] *Litigation Costs Order*, 2 FCC Rcd at 3246.

[44] The Commission has made it clear that adverse judgments or settlements after adverse judgments are not to be recovered from the ratepayers, absent very compelling justification. The Commission has taken the view that carriers will rarely, if ever, be able to meet this level of justification, stating that "[v]ery compelling evidence would, of course, be required to justify a conclusion that ratepayers benefited from violations of statutes that are designed, in substantial part, to protect consumers." *Litigation Costs Order*, 2 FCC Rcd at 3244.

[45] In para. 20, *supra*, we declined to approve in this proceeding replacement of in-house counsel costs during the litigation period as presumptively recoverable. We will likewise not allow Alascom to recover from ratepayers those estimated costs on general equitable grounds, in view of the large number of outside legal personnel assigned to the court proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for American Telephone and Telegraph Company

ORDER

Adopted: January 25, 1990; Released: January 31, 1990

By the Commission:

I. INTRODUCTION

1. On February 15, 1989, The American Telephone and Telegraph Co. (AT&T) filed a petition seeking changes in the manner in which the Commission prescribes AT&T's depreciation rates. AT&T requested that the Commission permit AT&T to set its depreciation rates for regulatory reporting purposes based on the depreciation rates it uses for financial reporting purposes. To accomplish this, AT&T requested that the Commission, on an ongoing basis, allow AT&T to seek represcription whenever its financial reporting depreciation rates changed, and apply depreciation rates to plant categories on a nationwide, rather than state-by-state, basis. AT&T also filed a schedule of revised depreciation rates reflecting these proposed changes.

2. In the *AT & T Depreciation Practices Order*,[1] the Commission declined to change its procedures to allow AT&T to base its book depreciation rates on the data and methodologies AT&T uses for financial reporting purposes. However, the Commission directed the staff to conduct a review of AT&T's revised depreciation rates on a nationwide basis, in accordance with existing rules and procedures and using current rate parameter data. The staff has completed that study and, based on the review and for the reasons set forth below, we represcribe AT&T's depreciation rates as set forth in the Appendix.

II. BACKGROUND

3. Depreciation is the loss in service value incurred in connection with the use and prospective retirement of telecommunications plant from known causes, the effect of which can be forecast with reasonable accuracy.[2] Depreciation accounting is the mechanism through which the loss in service value is distributed to operating expense during the service life of the plant. This Commission is authorized to prescribe depreciation rates to compute the allowable depreciation expense for telephone common carriers as part of our responsibilities under the Communications Act of 1934. [3]

4. Depreciation is an important factor in the determination of a carrier's revenue requirement. It has two primary effects. First, depreciation expense is included directly as a part of a carrier's revenue requirement. Second, the accumulation of the depreciation expense, which is commonly described as the depreciation reserve, is a deduction from the rate base and therefore affects the return and income tax components of a carrier's revenue requirement.

5. This Commission's practice is to review and revise, as necessary, depreciation rates for the larger carriers that are fully subject to our accounting rules. Carriers submit studies of plant lives and salvage factors which serve as the basis for the review. Based on the results of the review, the staff recommends new depreciation rates. Also, to meet unusual circumstances such as substantial reserve imbalances,[4] the staff may recommend that we prescribe amortization amounts.

6. In the *1985 AT & T Depreciation Rates Order* [5], we prescribed depreciation rates and amortizations for AT&T's 22 Interexchange Companies (IXCs), including amortization of the reserve imbalances for 13 jurisdictions. In the *1988 AT & T Depreciation Rates Order* [6], we again prescribed depreciation rates and amortizations for AT&T's 22 IXCs. In that order we prescribed reserve imbalance amortizations for the remaining 35 jurisdictions.

7. In its February 15, 1989, depreciation rate filing[7], AT&T sought to implement a single schedule of depreciation rates, applicable nationwide to all the IXCs, that were based on the depreciation rates that it uses for financial reporting purposes. The Bureau did not allow AT&T to book those rates on an interim basis, but it did give AT&T interim authority on June 8, 1989, to book a new annual reserve imbalance amortization of $143.8 million applicable to the Analog Circuit Account.

8. During 1989, while AT&T's study based on financial reporting rates was pending, AT&T submitted a study of the equipment service lives, net salvage values and mortality dispersion patterns for all of its accounts, using traditional depreciation methodologies. The Bureau staff reviewed AT&T's traditional depreciation rate study and proposal and prepared its own preliminary analyses. Following adoption of the *AT & T Depreciation Practices Order*, and pursuant to Section 220(i) of the Communications Act, 47 U.S.C. § 220(i), the Bureau transmitted these preliminary analyses by letter to the relevant state commissions. Those commissions were invited to provide their views thereon before the Bureau developed a formal proposal. No state commission responded to the Bureau's review letter.

9. The Bureau described the annual depreciation expense impact of its proposed rates and amortizations and initiated a pleading cycle by *Public Notice* [8] released December 12, 1989. The Bureau recommended that the amortizations previously prescribed by the Commission be continued. In addition, it recommended that the reserve imbalance amortization for the Analog Circuit Account be continued until December 31, 1989. The Bureau transmitted a copy of the *Public Notice* to AT&T and each state commission. Interested parties were invited to file comments. No comments were filed.

10. On December 21, 1989, AT&T filed for the depreciation rates and amortization amounts recommended in the *Public Notice*. Pursuant to Section 0.291 (b) (1) of the Commission's rules, the Bureau gave AT&T interim authority on December 22, 1989, to book these depreciation rates and amortization amounts pending Commission action.

III. DISCUSSION

A. *Depreciation Rates*

11. The projected service lives of AT&T's plant are based on certain factors not normally encountered in our review of carriers' depreciation rates. The most significant factor influencing AT&T's rate proposal herein is competition. We noted in the *AT & T Depreciation Practices Order* that the interexchange communications marketplace is subject to a level of competition that is "more pervasive" than the competition facing the local exchange carriers.[9] AT&T's competitors have invested large amounts in the modernization of their networks. In order to compete, AT&T must be able to introduce new products and services more rapidly than in the past.

12. The increasing level of competition has significantly accelerated the advancement of the state-of-the-art in telecommunications. One result is AT&T's accelerated replacement plan for its analog transmission facilities. AT&T states that its customers perceive a need for and hence require service over the most modern digital facilities. Thus, digital connectivity to all customer locations, nationwide or worldwide, has become a prime AT&T objective. As a result, AT&T has embarked on a rapid conversion to an all-digital network employing fiber optics. AT&T has demonstrated through the recent acceleration of retirement of its analog equipment, that it is carrying out this ambitious replacement plan. The substantial increase in depreciation rates prescribed herein is based upon this plan. No party questioned AT&T's projected service lives or salvage values. In view of all these factors, we are prescribing the rates that were proposed in the *Public Notice*, and which are set out in the Appendix hereto.[10]

B. *Amortizations*

13. The Bureau granted, on June 8, 1989, an annual amortization of $143.8 million applicable to the Analog Circuit Account. The Bureau was concerned that continued reserve imbalance amortization may be necessary to quickly eliminate the reserve deficiency in the Analog Circuit Account. The Bureau did not at that time specify an amortization termination date. In late 1989, when it allowed AT&T to book new depreciation rates on an interim basis,[11] the Bureau stated that this reserve imbalance amortization would cease on December 31, 1989.

14. We have reviewed the Bureau's actions in this regard and find them to be appropriate. The rates that we prescribe herein are adequate to assure AT&T prompt capital recovery, and we conclude, as did the Bureau, that additional amortization authority is not necessary.[12] However, in view of the magnitude of the January 1, 1989, reserve imbalance for the Analog Circuit Account, we will not require that the amortization taken prior to December 31, 1989, pursuant to the interim booking letter be reversed.

C. *Effective Date*

15. AT&T requested an effective date for the depreciation rates and amortizations of January 1, 1989. Inasmuch as the requested effective date is in accordance with Section 43.43(e) of our rules and our past depreciation orders, and no objections were raised regarding this effective date, we hereby adopt it.

D. *Submission of Whole - Life Depreciation Parameters*

16. In the depreciation prescription orders which we have approved since our decision in *Property Depreciation*,[13] we have required that depreciation filings include whole-life rates so that we could determine the size of the depreciation reserve imbalance and the speed with which our actions were resolving the imbalance. Because of our continued interest in these matters, we require AT&T to continue to file whole-life rates that are consistent with the remaining-life rates until notified to the contrary.

E. *Conclusion*

17. Having considered AT&T's proposal and the study upon which the proposal is based, and the Bureau's studies and analyses, we adopt the depreciation rates, amortization amounts, and effective date listed in the Appendix.

IV. ORDERING CLAUSES

18. ACCORDINGLY IT IS ORDERED, pursuant to Sections 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 201-205 and 220(b), that the percentages of depreciation and amortization amounts set forth in the Appendix to this Order ARE PRESCRIBED, effective January 1, 1989.

19. IT IS FURTHER ORDERED, That this *Order* IS EFFECTIVE UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FEDERAL COMMUNICATIONS COMMISSION APPENDIX
Schedule of Annual Percentages of Depreciation for
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Effective January 1, 1989

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 MOTOR VEHICLES	3.9	20	55.5	6.3	0
2114 TOOLS & OWE	12.7	2	38.0	4.7	-612
2121 BUILDINGS	30.0	3	28.1	2.3	-1927
2122 FURNITURE	13.4	4	31.6	4.8	7
2123 OFFICE EQPT	7.7	0	48.8	6.6	-76
2124 COE COMPUTERS	3.9	7	49.0	11.3	61
2211 COE ELECTRONIC ANALOG	3.1	1	53.2	14.8	61
2212 COE ELECTRONIC DIGITAL	9.1	1	27.4	7.9	11376
2215 COE CROSSBAR	1.3	0	69.6	23.4	1193
2220 OPERATOR SYSTEMS-OSP	8.2	1	15.2	10.2	0
2220 OPERATOR SYSTEMS-OTHER	1.5	1	69.2	19.9	2547
2231 COE RADIO	3.5	-4	58.9	12.9	17277
2231 SAT & EARTH STATIONS	5.9	0	48.6	8.7	0
2232 COE CIRCUIT ANALOG	2.2	-7	57.1	22.7	167410
2232 COE CIRCUIT DIGITAL	5.1	-3	25.0	15.3	-2282
2351 PUBLIC TEL TERM EQPT	8.3	0	14.9	10.3	-300
2362 OTHER TERMINAL EQPT	7.1	-2	61.5	5.7	-146
2411 POLES	11.9	-21	78.2	3.6	192
2421 AERIAL CABLE	4.6	8	14.4	16.9	390
2422 UNDERGROUND CABLE	10.9	-14	26.0	8.1	3618
2423 BURIED CABLE	11.7	-4	35.0	5.9	1494
2424 SUBMARINE CABLE	7.6	-2	40.7	8.1	-14
2431 AERIAL WIRE	9.2	-73	134.0	4.2	0
2441 CONDUIT	41.0	-8	5.2	2.5	184

The figures in Columns B, C, and D, are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The sum of the jurisdictional amortization amounts in Column E, ordered in FCC 85-568, released October 23, 1985 and FCC 89-29, released February 1, 1989, are continued for all accounts in accordance with those orders. For the COE Circuit Analog Account, in addition to the $23.6 million continued from FCC 85-568 and FCC 89-29, a new reserve imbalance amortization of $143.8 million is to be amortized over 12 months ending December 31, 1989.

FOOTNOTES

[1] The Modification of the Commission's Depreciation Prescription Practices as Applied to AT&T and the Prescription of Revised AT&T Depreciation Rates, 4 FCC Rcd 8567 (1989) (*AT&T Depreciation Practices Order*).

[2] 47 C.F.R. Section 32.9000.

[3] *See generally* 47 U.S.C. § 220(b) (1982). In recent years, we have also prescribed amortization amounts to resolve depreciation accounting problems. *See* Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, *Report and Order*, 3 FCC Rcd 984 (1988) (hereinafter, the *Amortization Order*). An amortization amount is a specific amount to be charged to depreciation expense each year as opposed to a depreciation rate which is applied to the plant investment to determine the depreciation expense charge.

[4] A reserve imbalance exists when a carrier's book reserve does not match its theoretical reserve. The imbalances are a reserve deficiency when the book reserve is less than the amount that "should" be in the reserve (*i.e.*, the amount that would be in the reserve if the current life and salvage estimates had been used from the day the plant was placed in service). *See* generally *Amortization Order*, 3 FCC Rcd at 985.

[5] The Prescription of Revised Depreciation Rates for: AT&T Communications of California, Inc. *et. al.*, FCC 85-568 (released October 23, 1985) (*1985 AT & T Depreciation Rates Order), recon.*, FCC 86-1985 (released April 18, 1986).

[6] The Prescription of Revised Depreciation Rates for: AT&T Communications of California, Inc. *et. al.*, 4 FCC Rcd 1466 (1989) (*1988 AT & T Depreciation Rates Order*).

[7] *See* para. 1, *supra*.

[8] Depreciation Rate Prescriptions Proposed for American Telephone and Telegraph Company - Pleading Cycle Established, DA 89-1588 *(Public Notice)*.

[9] *AT&T Depreciation Practices Order* at para. 29.

[10] Consistent with our decision in the *AT&T Depreciation Practices Order* not to prescribe AT&T's depreciation rates on a state-by-state basis, we hereby also relieve AT&T from the requirement to file Annual Report Form M Schedule B-5c on a state-by-state basis for the calendar year ended December 31, 1989 and calendar years thereafter. AT&T must file Annual Report Form M Schedule B-5c on a nationwide basis.

[11] *See* Letter from Kenneth P. Moran, FCC, dated December 22, 1989 to Richard B. Lee, AT&T.

[12] Existing amortizations prescribed in our previous orders are being continued. *See* para. 6, *supra*.

[13] Amendment of Part 31 (Uniform Systems of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) *(Property Depreciation), reconsideration*, 87 FCC 2d 916 (1981), *Supplemental Opinion and Order*, 87 FCC 2d 1112 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PIERCE KENNEDY HEARTH,
Complainant,

v. File No. E-89-137

AT&T COMMUNICATIONS, INC.
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1990; Released: February 2, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On March 17, 1989, Pierce Kennedy Hearth ("PKH") filed the above-captioned formal complaint with the Commission pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208. In the complaint, PKH alleged that AT&T Communications, Inc. ("AT&T") violated Section 201 of the Act, 47 U.S.C. § 201, for which violation PKH sought consequential damages. The basis for complainant's claim is the allegation that AT&T failed to process PKH's orders for additional trunk lines for its 800 service, and that AT&T deliberately delayed its efforts to identify and correct the resulting problems experienced by PKH.

2. On April 21, 1989, AT&T filed its answer to the complaint, denying all liability and asserting that, in all events, the limitation of liability provision in its tariff forecloses PKH's claim for consequential damages.

3. On January 11, 1990, PKH and AT&T filed a joint motion for an order permitting PKH to withdraw its complaint and terminating this proceeding, stating that PKH no longer desires to prosecute the complaint. PKH and AT&T state that withdrawal of the complaint and termination of the proceeding will affect no other party, and will serve the public interest by eliminating the need for further litigation.

4. On the basis of the statements contained in the motion, we conclude that there are no longer any issues in controversy, that the public interest will be served by eliminating the need for further proceedings, thereby conserving this Commission's resources, and that this proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion permitting PKH to withdraw the complaint is GRANTED, and that the above-referenced complaint proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-31

In the Matter of

Amendment of Section 73.202(b),	RM-7131
Table of Allotments,	
FM Broadcast Stations.	
(West Point, Mississippi)	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 18, 1990; Released: February 5, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Bob McRaney Enterprises, Inc. (petitioner), requesting the substitution of FM Channel 265C3 for Channel 265A at West Point, Mississippi. Petitioner also requests modification of its license for Station WKBB, Channel 265A, to specify operation on Channel 265C3.

2. We believe petitioner's proposal warrants consideration. Channel 265C3 can be allotted to West Point, Mississippi, in compliance with the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify the license for Station WKBB to specify operation on Channel 265C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for West Point, Mississippi, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as follows:

	Channel No.	
City	Present	Proposed
West Point, Mississippi	265A	265C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 29, 1990,** and reply comments on or before **April 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bob McRaney, Jr., President
Bob McRaney Enterprises, Inc.
Forrest Street
P.O. Box 1336
West Point, Mississippi 39773

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 265C3 are 33-37-21 and 88-45-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-30

In the Matter of

Amendment of Section 73.202(b), RM-7191
Table of Allotments,
FM Broadcast Stations.
(Rock Island and Moses Lake,
Washington)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: January 19, 1990; Released: February 5, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of KXA Radio Corporation (petitioner), permittee of Station KXAA(FM), Channel 258A at Rock Island, Washington, the Commission considers herein a petition for rule making seeking the substitution of Channel 258C3 for Channel 258A at Rock Island, and the modification of its permit to specify operation on Channel 258C3. Petitioner also seeks the substitution of Channel 242A for Channel 257A at Moses Lake, Washington, and the modification of KSEM, Inc.'s license for Station KDRM(FM) at Moses Lake to specify the new channel in order to accomplish the upgrade at Rock Island. Petitioner states its interest in applying for the channel, if allotted.

2. Channel 258C3 can be allotted to Rock Island, as that community's first wide coverage area FM service, consistent with the Commission's minimum distance separation requirements at the petitioner's proposed site,[1] if Channel 242A is substituted for Channel 257A at Moses Lake.[2] We are herein issuing a *Show Cause Order* to KSEM, Inc., the licensee of Station KDRM(FM) at Moses Lake, seeking comments as to why its license should not be modified to specify operation on Channel 242A in lieu of Channel 257A. In addition, since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

3. In view of the aforementioned, we shall propose to modify the construction permit of Station KXAA(FM) at Rock Island to specify operation on Channel 258C3, as requested. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Rock Island.

4. Petitioner states that it will reimburse the licensee of Station KDRM for all reasonable and prudent expenses associated with accomplishing its upgrade, in accordance with Commission policy.

5. Accordingly, we believe it is in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Moses Lake, Washington	257A, 262C1	242A, 262C1
Rock Island, Washington	258A	258C3

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, KSEM, Inc., licensee of Station KDRM(FM), Channel 257A, Moses Lake, Washington, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 242A in lieu of Channel 257A.

7. Pursuant to Section 1.87 of the Commission's Rules, KSEM, Inc., may, not later than **March 29, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on KSEM, Inc., to furnish additional information. If KSEM, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, KSEM, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: KSEM, Inc., 11005 NE 12th, Bellevue, WA 98004.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **March 29, 1990,** and reply comments on or before **April 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Neal J. Friedman, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D. C. 20006
(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's

Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates are 47-22-52 and 120-17-15.

[2] Channel 242A can be used at Station KDRM(FM)'s present transmitter site. The coordinates are 47-05-54 and 119-17-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-87

In the Matter of

Amendment of Section 73.606(b), RM-6637
Table of Allotments,
TV Broadcast Stations
(Bessemer and Tuscaloosa, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 18, 1990; Released: February 5, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 4 FCC Rcd 3729 (1989) (" *Notice* "), issued in response to a petition for rule making filed by Channel 17 Associates, Ltd. ("Channel 17"), licensee of Station WDBB(TV), Channel 17, Tuscaloosa, Alabama. The *Notice* proposed to amend the Television Table of Allotments by changing the community of license of Channel 17 from Tuscaloosa to Bessemer, Alabama, and to modify the license of Station WDBB(TV) accordingly. Channel 17 filed comments in support of the proposal. Birmingham Television Corporation ("BTC"), licensee of Station WBMG(TV), Channel 42, Birmingham, Alabama, filed comments opposing the proposal, and Channel 17 filed reply comments.[1,2]

2. In its comments, Channel 17 argues that the proposed change in community of license would be consistent with Section 1.420(i) of the Commission's rules. [3] Channel 17 claims that its proposal would result in a preferential arrangement of allotments under the Commission's television allotment priorities because it would provide Bessemer, a community of 31,729,[4] with its first local television service, whereas Tuscaloosa, a community of 75,211, has two television stations and a vacant noncommercial educational television allotment.[5]

3. In opposition, BTC claims that there is a substantial identity of interests between Bessemer and Birmingham, a community of 284,413. BTC argues that Bessemer is less than fifteen miles from downtown Birmingham, that Birmingham's daily newspapers serve Bessemer, that Bessemer officials consider Bessemer to be a part of the Bessemer-Birmingham area for educational purposes, and that these officials consider Bessemer and Birmingham to form a county-wide metropolitan area. Citing to *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *cert. granted on other grounds sub nom. Metro Broadcasting, Inc. v. FCC*, 58 U.S.L.W. 3427 (U.S. Jan. 9, 1990) (No. 89-453), and *Cleveland Television Corporation*, 91 FCC 2d 1129 (1982), *aff'd, Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984), BTC argues that "community" is defined more broadly in television cases than in radio cases, and that suburbs such as Bessemer are deemed to be served by television stations licensed to the principal city, in this case Birmingham. BTC notes that Arbitron ranks Birmingham as the nation's 49th largest television market, with five commercial stations and one non-commercial station, whereas Arbitron ranks Tuscaloosa as the 185th largest television market, with two commercial stations and one vacant noncommercial allotment. BTC also notes that Birmingham's commercial stations place a Grade A signal over Bessemer. Therefore, BTC argues, Bessemer is already well-served by the stations licensed to Birmingham and the reallotment of Channel 17 from Tuscaloosa to Bessemer would not be in the public interest.

4. In reply, Channel 17 characterizes BTC's opposition as based on the theory that an allotment to Bessemer would constitute a *de facto* additional service to Birmingham. Channel 17 cites to *Suburban Community Policy, Berwick Doctrine and the De Facto Reallocation Policy Doctrine*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984), noting that the Commission presumes a licensee intends to serve the community designated as its community of license. Channel 17 claims that BTC's opposition is the most recent in a pattern of actions by licensees in the Birmingham and Tuscaloosa markets to block petitioner's attempts to improve its station.[6]

5. Channel 17 argues that the reallotment to Bessemer would result in a preferential arrangement of allotments. Channel 17 notes that if the change is approved, a television station, three commercial FM stations and five AM stations will remain licensed to Tuscaloosa, whereas currently only a low power AM station is licensed to Bessemer. Furthermore, Channel 17 argues that this change would not constitute a move from a rural to an urban area, claiming that Tuscaloosa is not significantly further from Birmingham than Bessemer.[7]

6. Channel 17 argues that the key issue in this proceeding is whether Bessemer has a need for a first local television service. Channel 17 notes that Bessemer has its own city government and services, businesses, medical center, public library system, school system, airport, parks, auditorium and civic center, utility services, Chamber of Commerce, museum, and civic clubs. Channel 17 also notes that Bessemer is the central city of the Bessemer Cutoff area of Jefferson County.[8] Furthermore, Channel 17 argues that Birmingham television stations provide no special coverage of Bessemer events.

7. Channel 17 argues that in cases in which two petitioners propose allotments for different communities within a metropolitan area, or in which a petitioner has proposed the allotment of a television channel to a significant community within a metropolitan area, the Commission does not presume that the proposal is in reality a proposal to serve a larger, nearby city. Channel 17 cites to the Commission's allotment of a channel to Manassas, Virginia, in *Report and Order*, 35 RR 2d 277 (1975), to Irving, Texas, in *Report and Order*, 47 RR 2d 1641 (Br. Bur. 1980), and to Paradise, Nevada, in *Report and Order*, 57 RR 2d 1433 (Pol. and Rules Div. 1985), as instances in which the Commission allotted a channel to a significant community despite the fact that it was within a major metropolitan area. Channel 17 argues that the cases cited by BTC involved analysis of Section 307(b) principles in comparative hearings for new facilities. In such cases, argues Channel 17, strict application of the first local service priority would preempt an evaluation of the competing applicants' status under the Commission's other

comparative criteria. Because no such other factors are involved in this case, or in allotment cases generally, Channel 17 suggests that an alternate approach is warranted.

8. After careful analysis of the pleadings submitted in this proceeding, we believe that the public interest would best be served by denying Channel 17's request. Comparative consideration of Channel 17's proposal with the existing allotment arrangements indicates that this proposal would not result in a preferential arrangement of allotments. Therefore, Channel 17's proposal fails to meet one of the three requirements necessary to obtain a change of community of license pursuant to Section 1.420(i).[9]

9. We disagree with Channel 17's contention that its proposal is analagous to instances in which we have allotted channels to suburban communities such as Manassas, Virginia, Irving, Texas, and Paradise, Nevada. In each instance cited by Channel 17, a petitioner proposed a new allotment to a suburban community and no party proposed a conflicting use for that channel. Channel 17's proposal is conceptually distinct from these cases because Channel 17 has not requested the allotment of a new channel to Bessemer, but instead requests the reallotment of a channel currently serving Tuscaloosa to the community of Bessemer. We are therefore faced with the mutually exclusive options of retaining the allotment at Tuscaloosa or of allotting the channel to Bessemer. In such circumstances, we must comparatively consider the allotment proposals contemplated in each option.

10. When examined on its face, Channel 17's proposal appears to result in a preferential arrangement of allotments. Currently, there are two commercial television channels licensed to Tuscaloosa and no television channels licensed to Bessemer. Approval of Channel 17's proposal would result in the allotment of a first local television transmission service to Bessemer, and the removal of a second local television transmission service from Tuscaloosa. Generally, our allotment priorities favor the provision of first local television transmission service over second local television transmission service. However, BTC suggests that Bessemer's proximity to Birmingham raises a question as to whether, under Commission and court precedent, Bessemer is entitled to a first local service preference as compared to Tuscaloosa, or whether we should attribute to Bessemer the characteristics of Birmingham. We believe that, in order to resolve this question, it is necessary to examine the *Huntington* doctrine established in *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).[10]

11. The *Huntington* doctrine provides an exception to the Commission's policy of awarding a first local service preference in those cases in which a first local service preference is claimed for a community contiguous to a larger central city. In these instances, the Commission treats the entire metropolitan area as one community. We believe it is appropriate to apply the *Huntington* doctrine in this proceeding. While we acknowledge that we have not previously applied the *Huntington* doctrine in a television allotment proceeding, we believe that this is due primarily to the fact that the issue seldom arose in the past. First, until 1983 the Commission's rules permitted applicants for television allotments to propose to operate from any community within fifteen miles of the community to which the channel was allotted. The "fifteen mile" rule obviated the need for parties to petition to amend the Television Table of Allotments. *See Sixth Report and Order*, 41 FCC at 209. Therefore, virtually all issues concerning whether a community in a metropolitan area should receive a first local service preference arose during the hearing process and not in the rule making context. The "fifteen mile" rule was deleted by the Commission in 1983. *See Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *aff'd*, 56 RR 2d 835 (1984). Second, the Commission adopted an order several years later freezing the television table of allotments in certain metropolitan areas, thereby significantly reducing the quantity of allotment requests, and, therefore, the likelihood that such issues would arise. *See* 52 Fed. Reg. 28,346 (July 29, 1987). Finally, the already intensive use of spectrum in larger urban areas decreased the likelihood that parties would request suburban allotments in the years after 1983. Commission rule 1.420(i), adopted in MM Docket No. 88-526, provides some flexibility for existing licensees to propose such allotments. Therefore, the number of such proposals may increase. However, consistent with the Commission's stated concern that the procedural flexibility afforded by Commission rule 1.420(i) not result in a wholesale redistribution of stations from rural to urban areas,[11] we believe it warranted to engage in a *Huntington* type analysis.

12. We must determine, pursuant to the *Huntington* doctrine, whether Channel 17 is entitled to a first local service preference in conjunction with its request to allot a channel at Bessemer. The question, therefore, is whether we should consider Bessemer to be a community for comparative purposes in this contested proceeding.[12] The Commission has generally recognized that television is a more regional service than radio, and therefore has employed an expanded definition of "community" in television assignment cases that is not limited in meaning to "municipalities" but may include metropolitan areas as well. *See, e.g., St. Louis Telecast, Inc.*, 22 FCC 625, 713 (1957).[13] Furthermore, we note that in a recent AM radio assignment proceeding, the Commission determined that an Urbanized Area as described by the U.S. Census could be used in connection with a *Huntington* analysis as the standard for defining a metropolitan area "community" in Section 307(b) adjudicatory cases. *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). Consistent with *St. Louis Telecast* and *Winter Park Communications*, we believe it justified to employ a definition of "community" analogous to that found in *Tuck* in comparative television allotment proceedings.

13. Bessemer is a community less than fifteen miles from Birmingham. It is located within the Birmingham Standard Metropolitan Statistical Area and within the Birmingham Urbanized Area as defined by the U.S. Census. Were we to grant Channel 17's proposal, we would be removing a service from a community that is outside of the Birmingham Urbanized Area in order to provide a service to a community within that area. For comparative purposes in this proceeding, we believe it proper to treat the Birmingham Urbanized Area as a community. As a result, we must regard Channel 17's proposal not as a first local service to Bessemer, but as a sixth local television transmission service to the Birmingham Urbanized Area. Under the television allotment priorities, provision of a sixth local transmission service falls under the fifth allotment priority, whereas provision of a second local transmission service falls under the fourth priority.[14] Removal of a second local television transmission service from

Tuscaloosa to provide a sixth local television transmission service to the Birmingham Urbanized Area would not result in a preferential arrangement of allotments pursuant to the television allotment priorities. Therefore, we believe the public interest would best be served by retaining the Channel 17 television allotment at Tuscaloosa.[15]

14. Even if we were to find that Bessemer warranted a first local service preference, we do not believe that this preference would outweigh Tuscaloosa's need for a second local service. The television allotment priorities are not rigidly applied,[16] and first local service does not always prevail over second local service. *Cf. New South Broadcasting Corp. v. FCC*, 879 F.2d 867 (D.C. Cir. 1989). In this instance, provision of a first local service to Bessemer requires removal of an existing second service from a significantly larger community. In addition, there is a legitimate expectation of continued local transmission service from the channel at Tuscaloosa, and we believe that removal of that service from Tuscaloosa is justified only if offsetting factors show that removal is in the public interest. *Cf. KTVO, Inc.*, 57 RR 2d 648 (1984). We also note that approval of the change in community of license would provide no additional reception service because Channel 17 does not intend to change its technical facilities. Given the necessarily diminished value of a first local service to a suburban community such as Bessemer, the combined weight of countervailing factors is sufficient to overcome the first local service preference claimed by Channel 17. Therefore, we believe that the public interest will best be served by the retention of the allotment at Tuscaloosa.

15. Accordingly, IT IS ORDERED, That the petition for rule making filed by Channel 17 Associates, Ltd., IS DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] After the close of the pleading cycle, BTC filed a petition for leave to file supplemental comments. BTC's comments discuss *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* (" *Community of License R & O* "), 4 FCC Rcd 4870 (1989), *pet. for recon. pending*, which adopted Section 1.420(i) of the Commission's rules. The Commission released the *Community of License R & O* on June 15, 1989. BTC filed supplemental comments 27 days later. Channel 17 filed an opposition to BTC's petition for leave, arguing that BTC read petitioner's reply comments before filing its supplemental comments and that BTC offers no new substantive arguments prompted by the *Community of License R & O*.

We deny BTC's petition for leave to file. BTC fails to show good cause as to why we should accept its supplemental comments. Accordingly, BTC's supplemental comments will not be considered in this proceeding.

[2] The mayor of Bessemer submitted comments after the close of the pleading cycle. Because these comments are untimely, we will not consider them in this proceeding.

[3] Section 1.420(i) states that the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.

[4] All population figures are taken from the 1980 U.S. Census.

[5] First local television service is generally preferable to second local television service under our television allotment priorities. *See Sixth Report and Order*, 41 FCC 2d 148, 167 (1952).

[6] Channel 17 notes that the Mass Media Bureau rejected a petition to deny petitioner's 1984 application to construct an upgraded facility. Opponents of the application argued that Channel 17 was attempting a *de facto* reallotment of its station to Birmingham. Channel 17 claims that competitors attempted to prevent the Arbitron Ratings Company from listing its station in the Birmingham Market Report. Finally, Channel 17 notes that the Video Services Division of the Mass Media Bureau rejected a petition for reconsideration of its license renewal. This petition alleged that Channel 17's actions constituted an illegal relocation of its channel.

[7] Bessemer is approximately 24.1 kilometers (15 miles), and Tuscaloosa is approximately 56.3 kilometers (35 miles), from Birmingham.

[8] Birmingham and Bessemer are located in Jefferson County. In a letter attached to Channel 17's reply comments, the mayor of Bessemer explains that the Alabama legislature created the Bessemer Cutoff area of Jefferson County "in recognition of the fact that Bessemer and its surrounding suburbs and rural areas required special treatment as a separate jurisdiction". A courthouse at Bessemer handles county affairs for Jefferson County residents in the Bessemer Cutoff area.

[9] The three requirements are (1) the new allotment must be mutually exclusive with the existing allotment, (2) the allotment to the new community must better serve the Commission's allotment priorities and policies than maintaining the allotment to the existing community, and (3) the change must not deprive a community of its sole existing broadcast station. *See Community of License R & O*, 4 FCC Rcd at 4873-4874. It is not disputed that the Bessemer allotment would be mutually exclusive with the Tuscaloosa allotment, nor is it disputed that Tuscaloosa would retain a television transmission service, if we approved petitioner's proposal.

[10] We realize that in the hearing context a determination under the *Huntington* doctrine results in either the grant of a first local service preference or the elimination of that issue from the proceeding, whereas in a rule making proceeding, resolution of the *Huntington* issue may be the sole determinant of the outcome of the proceeding. Our goal in a contested allotment proceeding is to grant the allotment to the community most in need of service. This determination, guided by the allotment criteria, is frequently dependent on whether a particular community warrants a first local service preference. We believe that, in limited circumstances, the *Huntington* doctrine can provide guidance in making this determination.

[11] *Community of License R&O*, 4 FCC Rcd at 4873.

[12] No party questions whether Bessemer is a "licensable" community. Therefore, we are not presented with a question as to whether we could make an allotment to Bessemer if this was a non-comparative proceeding.

[13] We note that "[the Commission] has broad discretion under Section 307(b) to determine the public interest, and nothing in the Communications Act prevents the [Commission] from defining the term 'community' differently in different contexts." *Winter Park Communications v. FCC*, 873 F.2d at 352 (citations omitted).

[14] *Sixth Report and Order*, 41 FCC at 167 (1952).

[15] We note that evidence regarding the Arbitron television markets in which each community is located was given no weight in our determination.

[16] *See, e.g., Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *aff'd, Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-32

In the Matter of

Amendment of Section 73.202(b),	RM-6954
Table of Allotments,	RM-7051
FM Broadcast Stations.	RM-7077
(Fairmont, North Carolina,	RM-7200
Andrews, Charleston,	
Elloree and Little River,	
South Carolina)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: January 18, 1990; Released: February 5, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the following mutually exclusive petitions for rule making. Southern Communications, Inc. ("Southern"), permittee of a new FM station at Charleston, South Carolina, requests the substitution of Channel 263C2 for Channel 264A and the modification of its construction permit accordingly (RM-6954).[1] Little River Radio ("LLR"), requests the allotment of Channel 264A to Litle River, South Carolina, as the community's first local FM service (RM-7051). Pro Media, Inc. ("Pro Media"), licensee of Station WZYZ-FM, Fairmont, North Carolina, requests: (1) the substitution of Channel 265C2 for Channel 265A at Fairmont and the modification of its license accordingly; (2) the substitution of Channel 264A for Channel 265A at Andrews, South Carolina, and the modification of Station WQSC's license accordingly; and (3) the substitution of Channel 263A for Channel 264A at Charleston, South Carolina, and the modification of the construction permit for Channel 264A accordingly. Clarence E. Jones ("Jones"), licensee of Station WMNY-FM, Elloree, South Carolina, requests the substitution of Channel 262C3 for Channel 262A at Elloree and the modification of Station WMNY-FM's license accordingly.[2]

2. The allotment of Channel 262C3 at Elloree conflicts with the allotment of Channel 263C2 to Charleston. Elloree and Charleston are located 101 kilometers apart while the Commission's minimum distance separation requirements stipulate a separation of 117 kilometers for first adjacent Class C2 to Class C3 allotments. Channel 264A at Little River conflicts with the allotment of Channel 264A to Andrews and Channel 265C2 at Fairmont. Little River is located 93 kilometers from Andrews and 53 kilometers from Fairmont. However, the Commission's Rules stipulate a minimum separation of 105 kilometers for co-channel Class A allotments and 105 kilometers for first adjacent Class A and C2 allotments. Channel 264A at Andrews also conflicts with Channel 263C2 at Charleston, at the transmitter site requested by Southern. However, there is no conflict between the two proposals if a transmitter site 21.4 kilometers southwest of Charleston is stipulated. All of the parties stated an intention to apply for their respective channels, if allotted.

3. LLR states that the allotment of Channel 264A to Little River will provide the unincorporated community with its first local FM service. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. LLR states that Little River is an unincorporated community on the northeast coast of South Carolina, with a 1980 U.S. Census population of 2,000 persons, and with an estimated current population of 2,500 according to the Little River Chamber of Commerce. It goes on to state that Little River is governed by the County Government of Horry County and receives police protection from the County's Sheriff's Department. In addition, LLR notes that Little River has its own post office and zip code, volunteer fire department and three churches and that its economic base is derived from tourism, commercial fishing and agriculture. We have been unable to confirm that Little River is listed in the U.S. Census and LLR states that it is not incorporated. [3] Therefore, LLR should present the Commission with sufficient information to demonstrate that Little River has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985. We especially request information concerning the source of the information submitted in its petition and the manner in which it was derived.

4. Southern, Pro Media and Jones each urge the modification of their respective authorizations for Charleston, Fairmont and Elloree, stating that the increase in power could enable their stations to expand their coverage areas. In addition, Pro Media states that it will reimburse the licensee of Station WQSC at Andrews and the permittee of Channel 264A at Charleston for the reasonable costs associated with the change in their frequencies if Channel 265C2 is allotted to Fairmont. Jones notes that its proposal for Channel 262C3 at Elloree conflicts with Southern's proposal for Channel 263C2 at Charleston. However, he argues that adoption of his proposal for Elloree would better serve the public interest. In support, Jones points out that Elloree presently receives local service from only one FM and one AM station and that the area encompassed by the 60 dBu contour of the proposed Channel 262C3 allotment receives FM service from only three Class A allotments, two licensed to Orangeburg, South Carolina, and one to Bamberg, South Carolina. Charleston, according to Jones, presently receives local FM service from three Class C stations as well as five AM stations. Further, the area encompassed within the 60 dBu contour of Channel 263C2 at Charleston already receives service from three Class C, two Class C2 and four Class A stations. Therefore, it believes that any benefit from an additional upgraded facility in the Charleston market is outweighed by the need for a first wide-coverage area FM service at Elloree.

5. As a result of our preliminary analysis, the proposals herein must be considered on a comparative basis. Accordingly, we shall provide each proponent an opportunity to demonstrate in comments why their community should be preferred. In this regard, the parties should be guided by the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). We specifically request comment on the applicability, if any, of the "quiet village" doctrine to the Little River proposal. In addition, those parties seeking to upgrade their present service should submit gain area showings indicating the population and square miles of the increased area to be served. *See, Greenup, Kentucky*, 2 FCC Rcd 4319 (1987). *recon. granted* 4 FCC Rcd 3843 (1989). Southern is also requested to provide relevant information as to why the Commission should not impose the further 21.4 kilometer southwest site restriction in order to avoid the conflict with the Fairmont proposal should we determine that the public interest would be served by allotting Channel 263C2 to Charleston.

6. Channel 264A can be allotted to Little River in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.4 kilometers (0.9 miles) southwest to avoid a short-spacing to Station WTRG, Channel 264C, Rocky Mount, North Carolina. Channel 265C2 can be allotted to Fairmont with a site restriction of 30.8 kilometers (19.1 miles) southeast to accommodate petitioner's desired transmitter site. This allotment is also contingent upon grant of the request of John W. Pittman to substitute Channel 263C3 for Channel 263A at Marion, South Carolina (RM-7080). Channel 264A can be allotted to Andrews in compliance with the Commission's minimum distance separation requirements and can be used at Station WQSC's present transmitter site. Channel 263A can be allotted to Charleston in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Southern's construction permit. Channel 263C2 can be allotted to Charleston with a site restriction of either 7.1 kilometers (4.4 miles) south or 21.4 kilometers southwest. Channel 262C3 can be allotted to Elloree in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) southwest to avoid a short-spacing to Station WSCQ, Channel 261A, West Columbia, South Carolina, and to the pending applications for Channel 262A at Pawley's Island, South Carolina.[4]

7. As requested, we also propose to modify the authorizations of Station WZYZ-FM at Fairmont to specify Channel 265C2, Station WMNY-FM at Elloree to specify Channel 262C3, and Southern's construction permit to specify Channel 263C2. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of the higher powered channels at any of these locations or require the petitioners to demonstrate the availability of an additional equivalent class channel for use by such parties.

8. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
Option I		
Little River, South Carolina	--	264A
Elloree, South Carolina	262A	262C3
Option II		
Little River, South Carolina	--	264A
Charleston, South Carolina	236C, 245C,	236C, 245C,
OPTION III		
Fairmont, North Carolina	265A	265C2
Andrews, South Carolina	265A	264A
Charleston, South Carolina	236C, 245C, 264A, 278C	236C, 245C, 263A, 278C
Elloree, South Carolina	262A	262C3
OPTION IV		
Fairmont, North Carolina	265A	265C2
Andrews, South Carolina	265A	264A
Charleston, South Carolina	236C, 245C, 264A, 278C	236C, 245C, 263C2, 278C[5]

9. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Fogel Media, Inc., licensee of Station WQSC, Channel 265A, Andrews, South Carolina, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 264A as proposed herein and Southern Communications, Inc., permittee of a new station on Channel 264A at Charleston, South Carolina, SHALL SHOW CAUSE why its construction permit SHOULD NOT BE MODIFIED to specify operation on Channel 263A as proposed herein.

10. Pursuant to Section 1.87 of the Commission's Rules, Fogel Media and Southern may, not later than **March 29, 1990,** file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Fogel Media and/or Southern to furnish additional information. If Fogel Media and/or Southern raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission

may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, Fogel Media and Southern will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

11. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following: Fogel Media, Inc., P.O. Box 2428, Pawley's Island, South Carolina 29585, and Southern Communications, Inc., 35 Sorrento Boulevard, Hanahan, South Carolina 29418.

12. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

13. Interested parties may file comments on or before **March 29, 1990,** and reply comments on or before **April 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerrold Miller, Esq.
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel to Southern)

Edward W. Hummers, Jr., Esq.
Robert A. DePont, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(Counsel to Jones)

Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons & Topel, P.C.
1000 Connecticut Avenue, Suite 500
Washington, D. C. 20036
(Counsel to Southern)

Samuel B. Roberts
1270 15 Mile Landing
Awendaw, South Carolina 29429
(Petitioner for Little River)

Mark J. Prak, Esq.
Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, North Carolina 27602
(Counsel to Pro Media)

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Southern is the successor in interest to the original petitioner, Alan A. Jenkins. Jenkins' request was dismissed by letter of July 12, 1989, due to the pendency of Applications for Review of the grant of the construction permit. On August 10, 1989, Southern filed a petition for reconsideration of the dismissal of his petition. However, on December 1, 1989, the Commission granted the settlement agreement betweeen Southern and the applicants seeking review and dismissed their Applications for Review. That action is now no longer subject to review. Therefore, the basis for returning the petition for rule making no longer exists. Thus, although we do not reach the merits of Southern's petition for reconsideration, we grant the request to the extent of considering its request as if filed after grant of its application was no longer subject to review. The petition has, therefore, been processed in accordance with the "new" spacings in effect after October 2, 1989. *See,* 4 FCC Rcd 6375 (1989).

[2] The Commission received Jones' petition on September 18, 1989. By letter of November 2, 1989, the Commission returned the petition as unacceptable due to a finding that the allotment could not be site restricted in such a manner as to provide Elloree with the required 70 dBu signal and also avoid a short-spacing to Station WSCQ, West Columbia, South Carolina, and vacant but applied for Channel 262A at Pawley's Island. Jones has resubmitted his petition along with a reconsideration request seeking the acceptance of its proposal *nunc pro tunc,* based on the belief that the Commission erred in returning the request. We find that the petition was erroneously returned and hereby grant his petition for reconsideration and accept the petition *nunc* pro tunc.

[3] We note that Little River is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 500 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

[4] The coordinates for Channel 265C2 at Fairmont, North Carolina, are North Latitude 34-15-47 and West Longitude 78-55-50. The coordinates for Channel 264A at Andrews, South Carolina, are 33-24-24 and 79-27-07. The coordinates for 263A at Charleston are 32-49-20 and 79-58-45. The coordinates for Channel 263C2 at Charleston, with a 7.1 kilometer south site restriction, are 32-41-59 and 79-55-34, and with a 21.4 kilometer southwest site restriction, are 32-36-30 and 80-04-00. The coordinates for Channel 262C3 at Elloree are 33-22-00 and 80-40-00. The coordinates for Channel 264A at Little River are 33-52-00 and 78-37-00.

[5] Channel 263C2 can be allotted to Charleston in this option with a site restriction of 21.4 kilometers southwest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-563

In the Matter of

Amendment of Section 73.202(b),	RM-6441
Table of Allotments,	RM-6685
FM Broadcast Stations.	
(Burkesville and Russell Springs, Kentucky, Cookeville and Spencer, Tennessee)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 18, 1990; Released: February 5, 1990

By the Chief, Allocations Branch:

1. The Commission issued a *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 7274 (1988), in response to a petition for rule making filed by P&G Communications-Kentucky ("P&G"), proposing the allotment of Channel 300A to Russell Springs, Kentucky. In response to the *Notice*, P&G filed comments restating its interest in Channel 300A at Russell Springs. WHUB, Inc. ("WHUB"), licensee of Station WHUB(FM), Channel 252A, Cookeville, Tennessee, filed a counterproposal[2] requesting the substitution of Channel 253C2 for Channel 252A at Cookeville, Tennessee, and modification of its license for Station WHUB(FM) to specify operation on the higher powered channel. In order to accommodate the upgrade at Cookeville, WHUB has also requested substitution of Channel 300A for Channel 253A at Burkesville, Kentucky, modification of the construction permit for that channel, substitution of Channel 297A for Channel 254A at Spencer, Tennessee, [3] and the allotment of Channel 224A to Russell Springs to satisfy the interest expressed by P&G. WKYR, Inc., ("WKYR"), permittee of Station WKYR(FM), Channel 300A, Burkesville, Kentucky, filed comments in response to the counterproposal opposing the channel substitution at Burkesville. P&G filed a motion for leave to file reply comments and reply comments, and WKYR filed a motion to accept late filed reply comments and reply comments.[4]

2. In its counterproposal, WHUB states that it will reimburse WKYR, Inc. ("WKYR"), the permittee of Station WKYR, as ordered by the Commission. WHUB notes that on September 15, 1988, it notified WKYR that it may be required to change channels, and consistent with prior case law, WKYR should only be entitled to reimbursement for costs incurred before September 15, 1988, citing *Mio and Harbor Springs, Michigan*, 3 FCC Rcd 3699 (1988) and *Dyersburg, Tennessee, et al*, 2 FCC Rcd 7466 (1987). WHUB states that the construction permit for Station WKYR, Channel 253A at Burkesville, Kentucky, issued January 28, 1988, should have been conditioned on the outcome of WHUB's then pending petition to substitute channels at Burkesville. WHUB also states that the proposed allotment of Channel 297A to Spencer, Tennessee, meets the spacing requirements to all existing authorizations and reference coordinates pursuant to Section 73.208(b)(1) of the Commission's Rules, including the reference point for Channel 295C2 at Monterey, Tennessee, which was established in MM Docket No. 86-512. However, First Media of Monterey ("First Media"), licensee of Station WRJT(FM), Monterey, Tennessee, has applied for Channel 295C2 at a site which would be short-spaced to the instant proposal. Therefore, WHUB states that the processing of the Monterey application should be delayed in accordance with past Commission treatment of conflicts between sites specified in applications and petitions to amend the FM Table of Allotments, citing *Frederiksted, Virgin Islands*, 2 FCC Rcd 5202 (1987).

3. WKYR filed comments in response to the counterproposal. WKYR contends that WHUB is incorrect in its description of the status of Channel 253A at Burkesville. WKYR states that on September 15, 1988, when WHUB filed its petition, it was involved in erecting a tower and installing equipment that had been ordered since May and June of 1988. WKYR also states that most of the equipment was in its possession and construction was well underway. WKYR notes the fact that it went on the air with program test authority on October 26, 1988, roughly 30 days after the date on which WHUB contends that no construction had commenced. WKYR also takes issue with WHUB's contention that the construction permit for WKYR, issued on January 28, 1988, should have been conditioned upon the outcome of WHUB's pending petition to substitute channels for Burkesville, Kentucky. WKYR states that as far as reimbursement for costs incurred, WHUB should be required to pay all costs involved in the frequency change for WKYR.

4. In its reply comments, WKYR states that it is now willing to consent to the change to Channel 300A at Burkesville, due to the Commission's recent ruling in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), which permits Class A stations to increase their maximum power to 6 kW. Accordingly, WKYR withdraws its opposition and supports WHUB's proposal to upgrade its Cookeville station. However, WKYR believes it is entitled to reimbursement for the reasonable costs of the frequency change. WKYR also urges the Commission to modify its permit to specify Channel 300A under the new rules as a 6 kW facility so that it may implement the increase in power without the need to file a Form 301 application.

5. We have considered the arguments raised concerning the reimbursement requirements. WHUB states its willingness to reimburse WKYR for the reasonable costs incurred in changing frequencies, as required by Commission policy. WHUB is required to reimburse Station WKYR for all reasonable and necessary expenses incurred with its change in Channel to 300A. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). We reject WHUB's claim that the grant of WKYR's permit should have been conditioned on WHUB's petitions for rule making on file at the Commission on January 28, 1988. Those petitions were never accepted for consideration, and have been returned by letter or dismissed by *Order*. They provided no adequate notice that the Burkesville channel might be changed. Therefore, this case is unlike cases in which we decline to order reimbursement of an applicant that accepted a grant of a construction permit contingent on the outcome of a fully acceptable and

pending rule making petition. *See, e.g., Bartow, Chauncey, Dublin, Soperton, etc.*, 4 FCC Rcd 6876 (1989). In such cases, the permittee constructs the station and goes on the air at its own risk, knowing that its channel of operation is subject to change. We also reject WHUB's contention that it should not be required to reimburse WKYR for channel change expenses necessitated by WKYR's action to construct its station taken after September 15. The precedent cited by WHUB for its contention consists of two *Notices of Proposed Rule Makings*, neither of which stands for the proposition WHUB advocates. We conclude that WKYR's actions to commence service to the public were both reasonable and necessary, and that any reasonable and necessary channel change expenses that arose as a result of those actions should be fully reimbursed.

6. With respect to First Media's application we conclude that it represents a mere site preference, and therefore, does not present a sufficient public interest benefit to warrant preference over the benefits that could be realized from WHUB's proposal. *See Andalusia, Alabama*, 49 FR 32201, August 13, 1984. First Media has been ordered to amend its application. *See Campbellsville, Smiths Grove, and Cave City, Kentucky*, 4 FCC Rcd (1989), _____ DA 89-1584 (released December 22, 1989).

7. As for WKYR's request that it be allowed to implement 6 kW operation on Channel 300A without filing a Form 301 application, we decline to grant its request in this proceeding. Our standard procedure is to grant equivalent class channel substitutions on the assumption that all other station parameters will be maintained. In view of the fact that there are other more suitable mechanisms for obtaining the relief WKYR seeks,[5] we conclude that it would not be conducive to the efficient transaction of Commission business to exempt a station in FM allotment proceedings from the filing of Form 301 in order to effectuate a 3 to 6 kW upgrade.

8. We believe the public interest would be served by allotting Channel 224A to Russell Springs, Kentucky, as a first local service, and upgrading Station WHUB(FM) at Cookeville, Tennessee, since it could provide the community with an expanded FM service. As requested, we shall modify the license of Station WHUB(FM) to specify operation on Channel 253C2. In order to accomplish the allotment of Channel 253C2 at Cookeville, Tennessee, we will substitute Channel 300A for Channel 253A at Burkesville, Kentucky. A staff engineering analysis confirms that Channel 253C2 can be substituted for Channel 252A at Cookeville, Tennessee,[6] with a site restriction of 0.9 kilometers (0.6 miles) northwest. Channel 300A can be substituted for Channel 253A at Burkesville, Kentucky, at the construction permit site,[7] with a site restriction of 1.0 kilometers (0.6 miles) west. Channel 297A can be substituted for Channel 254A at Spencer, Tennessee.[8] The applicant for Channel 254A at Spencer, Tennessee, will be permitted to amend its application to specify operation on Channel 300A and will retain its application filing protection since the channels are of an equivalent class. *See, Phillipsburg, Kansas*, 48 FR 10844 (1983). Channel 224A can be allotted to Russell Springs, Kentucky,[9] with a site restriction of 5.4 kilometers (3.3 miles) southwest.

9. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Burkesville, Kentucky	300A
Russell Springs, Kentucky	224A
Cookeville, Tennessee	234C, 253C2
Spencer, Tennessee	297A

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WHUB, Inc., for Station WHUB(FM), Cookeville, Tennessee, IS MODIFIED, to specify operation on Channel 253C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of WKYR, Inc., for Station WKYR(FM), Burkeville, Kentucky, IS MODIFIED, to specify operation on Channel 300A in lieu of Channel 253A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WKYR(FM)'s construction permit, BPH-870429MN except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-870429MN, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee of WKYR, Inc., and the applicants for Channel 254A at Spencer, Tennessee, as follows:

Ray Mullinix
Vice President
& General Manager
WKYR, Inc.
P. O. Box 340
Burkesville, Kentucky 42717
(Permittee for Station WKYR)

Stanley G. Emert, Esq.
Lockridge & Becker
1120 First American Center
P.O. Box 107
Knoxville, Tennessee 37901
(Attorney for Spencer
Broadcasting Group)

C. Michael Norton, Esq.
Baker, Worthington,
Crossley, Stansberry
& Woolf
2100 West End Avenue,
Suite 900
Nashville, Tennessee 37203
(Attorney for Spencer
Communications, Ltd.)

Timothy K. Brady, Esq.
7113 Peach Court - Suite 208
Brentwood, Tennessee 37024
(Attorney for Van Buren
Broadcasting)

William H. Crispin, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hand
8280 Greensboro Drive -
6th Floor
McLean, Virginia 22102
(Attorney for Johnny
Leyfette Ashley)

Russell C. Powell, Esq.
Southmayd, Powell
and Taylor
1764 Church Street, N.W.
Washington, D.C. 20036
(Attorney for Hugh L. Hale
and Tommy Miller)

Christopher J. Reynolds, Esq.
Peper, Martin, Jensen,
Maichel & Hetledge
1401 New York Avenue, N.W.,
Suite 630
Washington, D.C. 20005
(Attorney for First Media of
Monterey, Inc.)

13. The window period for filing applications for Channel 224A at Russell Springs, Kentucky, will open on **March 23, 1990,** and close on **April 23, 1990.**

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Burkesville, Kentucky, and Cookeville and Spencer, Tennessee, have been added to the caption.

[2] Public Notice of the counterproposal was given on March 17, 1989, Report No. 1771, RM-6685.

[3] Channel 254A was allotted to Spencer, Tennessee, as part of the omnibus FM rule making in MM Docket No. 84-231. There are presently five pending applications for Channel 254A at Spencer, Tennessee.

[4] We have accepted these pleadings. P&G's sole purpose is to concur in WHUB's proposed resolution of this proceeding, and WKYR's pleading eliminates the need for issuing an *Order to Show Cause* concerning the change in WKYR's channel proposed by WHUB. Because these pleadings aid in the expeditious resolution of this proceeding they will be accepted.

[5] WKYR is free, after this order becomes effective, to request, by letter directed to the Chief, FM Branch, Audio Services Division, Mass Media Bureau, that it be allowed to commence 6 kW operation without filing a Form 301. The Chief of the FM Branch will respond by either denying the request or providing WKYR with a letter to be attached to its Form 302 submission. This mechanism allows the Chief of the FM Branch to insure, *inter alia*, that any Allocations Branch *Order* relied upon by WKYR has become effective, and has not been stayed by operation of Section 1.420(f) of the Commission's rules.

[6] The coordinates for Channel 253C2 at Cookeville, are North Latitude 36-10-25 and West Longitude 85-30-40.

[7] The coordinates for Channel 300A at Burkesville, are North Latitude 36-47-30 and West Longitude 85-22-47.

[8] The coordinates for Channel 297A at Spencer, are North Latitude 35-44-48 and West Longitude 85-28-06.

[9] The coordinates for Channel 224A at Russell Springs, are North Latitude 37-01-40 and West Longitude 85-07-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-33

In the Matter of

Amendment of Section 73.202(b), RM-7080
Table of Allotments,
FM Broadcast Stations.
(Marion, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 18, 1990; Released: February 6, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by John W. Pittman (petitioner), permittee of Station WQTI-FM, Marion, South Carolina, requesting the substitution of Channel 263C3 for Channel 263A, and the modification of its construction permit accordingly. Petitioner states that he will apply for the channel, if allotted.

2. Channel 263C3 can be allotted to Marion in compliance with the Commission's minimum distance separation requirements with a site restriction of 21 kilometers (13.1 miles) northwest to avoid a short-spacing to the requested allotment of Channel 265C2 at Fairmont, North Carolina, and Channel 264A at Andrews, South Carolina (RM-7077).[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 263C3. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 263C3 at Marion or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 263C3 for Channel 263A at Marion, South Carolina, since it could enable Station WQTI-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Marion, South Carolina	232A, 263A	232A, 263C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 29, 1990,** and reply comments on or before **April 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, North Carolina 27602
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-19-23 and West Longitude 79-32-32.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-324

In the Matter of

Amendment of Section 73.202(b), RM-6774
Table of Allotments,
FM Broadcast Stations.
(Ebenezer, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 18, 1990; Released: February 5, 1990

By the Chief, Allocations Branch:

1. At the request of JimBar Enterprises (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5937 (1989), proposing the allotment of Channel 280A to Ebenezer, Mississippi, as that community's first FM broadcast service. Petitioner restated its intention to apply for the channel. No other comments were received.

2. As stated in the *Notice*, Ebenezer is not incorporated or listed in the 1980 U.S. census. Therefore, petitioner was requested to provide information to support a finding that Ebenezer is a community for allotment purposes. In response, petitioner states that Ebenezer is a community with its own businesses, social organizations and governmental units, and that Ebenezer's residents act as a community and share common interests. Petitioner provides a portion of the U.S.G.S. 7.5 minute map showing the boundaries of Ebenezer's business district and notes that there is no nearby larger community of which Ebenezer could be considered a part. The Ebenezer Baptist Church, according to petitioner, was established in 1879 and is one of the oldest continuously operating churches in Mississippi. It is one of six churches in the community. Petitioner further notes that Ebenezer has a volunteer fire department and a post office with its own zip code. Petitioner notes that Ebenezer is served by the Ebenezer branch of the Yazoo City Valley Electric Power Association, and is home to numerous commercial enterprises, such as Ebenezer Cash Grocery, Gnemi & Co., Ebenezer Farm and Car Repair Shop and the Ebenezer Airport.

3. We believe that petitioner provided sufficient information to show that Ebenezer meets the Commission's definition of a community for allotment purposes. It is an identifiable population grouping with businesses and community organizations which identify themselves with Ebenezer.

4. Channel 280A can be allotted to Ebenezer in compliance with the Commission's minimum distance separation requirements provided there is a site restriction 10.6 kilometers (6.6 miles) southwest of the community.[1] The site restriction will prevent a conflict with Station WCLD-FM, Channel 280A, Cleveland, Mississippi, and vacant Channel 281C2 at Union, Mississippi.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 22, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Ebenezer, Mississippi	280A

6. The window period for filing applications will open on **March 23, 1990,** and close on **April 23, 1990.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 280A are 32-54-13 and 90-10-18. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules.

[2] There are currently five applications on file for the channel at Union, Mississippi. The site restriction on channel 280A at Ebenezer protects the allotment at Union and the five applicants' sites.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEMPO CABLE, INCORPORATED,
Complainant,

v. File No. PA-87-0016

SOUTHWESTERN ELECTRIC
POWER COMPANY
Respondent.

ORDER

Adopted: January 22, 1990; Released: February 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 22, 1987 Tempo Cable, Incorporated filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company (SWEPCO) had imposed unjust and unreasonable rates for cable television pole attachments. This matter was deferred pending issuance of amended rules for processing pole attachment rate complaints, *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4389 (1987).

2. On December 18, 1989, counsel for complainants defendant filed a joint motion for dismissal of the complaint with prejudice, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GILMER CABLE TELEVISION
COMPANY, INCORPORATED,
Complainant,

v. File No. PA-87-0001

SOUTHWESTERN ELECTRIC
POWER COMPANY,
Respondent.

ORDER

Adopted: January 22, 1990; Released: February 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 31, 1986, Gilmer Cable Television Company, Incorporated filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company had imposed unjust and unreasonable rates for cable television pole attachments. This matter was deferred pending issuance of amended rules for processing pole attachment rate complaints. *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4389 (1987).

2. On December 18, 1989, counsel for complainant and defendant filed a joint motion for dismissal of the complaint, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIMES MIRROR CABLE TELEVISION
OF TEXARKANA, INCORPORATED,
Complainant,

v. File No. PA-86-0004

SOUTHWESTERN ELECTRIC
POWER COMPANY,
Respondent.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 22, 1990; Released: February 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On February 10, 1986, Times Mirror Cable Television of Texarkana, Incorporated filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company had imposed unjust and unreasonable rates for cable television pole attachments. This matter was deferred pending issuance of amended rules for processing pole attachment rate complaints, *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4389 (1987).

2. On December 18, 1989, counsel for complainant and defendant filed a joint motion for dismissal of the complaint, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONGVIEW CABLE TV
COMPANY, INCORPORATED,

KILGORE CABLE TV, INCORPORATED,
Complainants,

v. File No. PA-86-0005

SOUTHWESTERN ELECTRIC
POWER COMPANY,
Respondent.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 22, 1990; Released: February 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On February 13, 1986, Longview Cable TV Company, Incorporated and Kilgore Cable TV, Incorporated filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company had imposed unjust and unreasonable rates for cable television pole attachments. This matter was deferred pending issuance of amended rules for processing pole attachment rate complaints, *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4389 (1987).

2. On December 20, 1989, counsel for complainants and defendant filed a joint motion for dismissal of the complaint, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SERVICES,
INCORPORATED,
Complainant,

v. File No. PA-88-0001

SOUTHWESTERN ELECTRIC
POWER COMPANY,
Respondent.

ORDER

Adopted: January 22, 1990; Released: February 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 21, 1987, Communications Services, Incorporated filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company had imposed unjust and unreasonable rates for cable television pole attachments.

2. On December 18, 1989, counsel for complainant and defendant filed a joint motion for dismissal of the complaint, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEXAS CABLEVISION COMPANY,
T.V. CABLE, INCORPORATED,
Complainants,

v. File No. PA-84-0007

SOUTHWESTERN ELECTRIC
POWER COMPANY
Respondent.

ORDER

Adopted: January 22, 1990; Released: February 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On April 19, 1984, Texas Cablevision Company (Texas Cablevision) and T.V. Cable, Incorporated (T.V. Cable) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company (SWEPCO) had imposed unjust and unreasonable rates for cable television pole attachments. The Commission ruled in favor of the complainant,[1] but subsequently, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Commission's decision for further proceedings. *Southwestern Electric Power Co. v. FCC*, No. 85-1570 (D.C. Cir. Apr. 1, 1987).

2. On December 19, 1989, counsel for complainants Texas Cablevision and TCI International, Incorporated (formerly, T.V. Cable) along with counsel for defendant SWEPCO filed a joint motion for dismissal of the complaint with prejudice, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] Texas Cablevision Co. v. Southwestern Electric Power Co., Mimeo No. 2747 (released Feb 26, 1985); *rev. denied*, FCC 85-476 (released Aug. 22, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESERVICE CORPORATION OF AMERICA, INCORPORATED,

T.V. CABLE SYSTEM,

TEXAS COMMUNITY ANTENNAS, INCORPORATED,
Complainants,

v. File No. PA-87-0002

SOUTHWESTERN ELECTRIC POWER COMPANY,
Respondent.

ORDER

Adopted: January 22, 1990; Released: February 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 21, 1987, Teleservice Corporation of America and Texas Community Antennas, Incorporated, acting on its own behalf and also d/b/a T.V. Cable System, filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Southwestern Electric Power Company had imposed unjust and unreasonable rates for cable television pole attachments. This matter was deferred pending issuance of amended rules for processing pole attachment rate complaints, *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4389 (1987).

2. On December 18, 1989, counsel for complainants and defendant filed a joint motion for dismissal of the complaint, advising that a settlement agreement has been entered into by the parties. According to counsel, the agreement resolves all issues in controversy and requires that the complaint be dismissed with prejudice and the proceeding terminated.

3. We encourage negotiations and mutually agreeable settlements in complaint cases since such private resolutions among parties serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion IS GRANTED and the complaint in the above-referenced proceeding IS DISMISSED with prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-11

In the Matter of

AT&T COMMUNICATIONS, INC.
Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan 2 -
Resort Condominiums International

Transmittal No. 1854

ERRATUM

Released: February 2, 1990

By the Chief, Common Carrier Bureau:

1. The caption of an Order released by the Common Carrier Bureau in the above captioned proceeding, DA 90-44, January 19, 1990, is corrected to read:

CC Docket No. 90-11

In the Matter of

AT&T COMMUNICATIONS, INC.
Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan 2 -
Resort Condominiums International

Transmittal Nos. 1854 and 1883

2. Footnote 1 in paragraph 2 of the Order is corrected to read:

> AT&T's Competitive Pricing Plans offer telecommunications service to a specific customer at rates established to respond to a competitor's offer. AT&T's first Competitive Pricing Plan, the Holiday Rate Plan (HRP), was introduced in tariff revisions filed May 9, 1988, under Transmittal No. 1215. On November 6, 1989, AT&T filed amendments to CPP2 under Transmittal No. 1883.

3. Paragraph 35 of the Order is corrected to read:

> Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by AT&T Communications, Inc., in Tariff F.C.C. No. 15, Transmittal Nos. 1854 and 1883, and into the lawfulness of the offer made by MCI Telecommunications Corporation to Resort Condominiums International.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CONTINENTAL CELLULAR File No. 10003-CL-P-316-A-88

For Authority to Construct and
Operate a Domestic Cellular
Radio Telecommunications System
on Frequency Block A to serve
the Alaska 2 - Bethel
Rural Service Area (RSA)

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1990; Released: February 2, 1990

By the Commission:

1. The Commission has before it a petition seeking reconsideration of the October 26, 1988 action of the Mobile Services Division, Common Carrier Bureau returning the captioned application filed by Continental Cellular (Continental) as defective.[1]

I. BACKGROUND AND CONTENTIONS

2. On July 15, 1988, Continental filed the captioned application for authority to operate and construct a cellular radio system in the Alaska 2 - New Bethel Rural Service Area (RSA) Block A. Continental was announced as the lottery winner for this RSA on September 27, 1988.[2] In its application, Continental states that it is a general partnership, and lists those partners having ownership interests of 5% or more. In addition, Continental's application lists three general partners who are aliens. Accordingly, by letter dated October 26, 1988, the Mobile Services Division (MSD) returned Continental's application for failure to comply with the alien ownership restrictions for common carrier licensees. Specifically, the MSD stated that Continental's application failed to comply with Section 22.4 of the Commission's Rules [3] and Section 310(b) of the Communications Act of 1934, as amended.[4] Citing *Wilner & Scheiner*, 103 FCC 2d 511 (1985), *reconsidered in part*, 1 FCC Rcd 12 (1986) (*Wilner & Scheiner Reconsideration Order*), the MSD concluded that Section 310(b) of the Act precludes grant of a common carrier license to a general partnership in which alien general partners hold ownership interests, and thus, pursuant to Section 22.20 of the Rules returned Continental's application as unacceptable for filing. In addition, the letter concluded that Continental failed to disclose all of the ownership interests in its partnership, as required by Sections 22.13(a)(1) and 22.921(b)(1) of the Rules.[5]

3. On November 30, 1988, Continental filed a petition seeking reconsideration of the MSD action and reinstatement of its application, and an amendment to its application stating that its general partnership had been changed to a limited partnership. In its Petition for Reconsideration, Continental argues that the MSD erred in dismissing its application on the ground that a partnership with alien general partners may not be granted a common carrier license. Based on its interpretation of Section 310(b) of the Act, and Section 22.4 of the Rules, Continental contends that the Commission is only prohibited from granting a common carrier license to a corporation in which there are alien officers or directors, or of which aliens hold more than 20% of the stock. It argues that the statute, the rule, and the legislative history are silent, however, regarding partnerships, and that, therefore, Section 310(b) of the Act does not prevent the Commission from granting a common carrier license to a partnership whose alien general partners meets the 20% ownership limitation of Section 310(b)(3). Moreover, Continental argues, the statute is not violated by alien general partners who by partnership agreement are sufficiently insulated from management so as not to exercise control over the affairs of the partnership.[6] In such cases, Continental argues, individual general partners cannot influence, much less control, the partnership even though the partners have a vote in other partnership matters. Finally, Continental states that it has filed a permissible minor amendment to its application to demonstrate that the alien partners of the partnership are now limited partners.

II. DISCUSSION

4. Having reviewed the arguments raised by Continental in its petition, we deny its requested relief. We find that Continental's application was properly returned pursuant to Section 22.20 of the Rules. Section 22.20 of the Rules provides, in pertinent part, that an application will be returned to the applicant as unacceptable for filing if:

> (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

Continental's application does not comply with the alien ownership rules embodied in Section 22.4 of the Rules, and Section 310 of the Communications Act.

5. Section 310(b) prohibits the grant of an application to a corporation in which any officer or director is an alien, or of which more than twenty percent of the stock is owned or voted by aliens. Although the language of Section 310(b) specifically refers to corporations, the alien ownership restrictions are also applicable to non-corporate entities and associations. *See e.g., Wilner & Scheiner, supra; PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988) (beneficiaries of an irrevocable trust); *Farragut Television Corp.*, 4 Rad. Reg. 2d (P&F) 350 (1965) (policy holders of a mutual insurance company). Moreover, in *Wilner & Scheiner Reconsideration Order, supra*, we specifically interpreted the statutory restrictions relating to alien officers and directors to encompass non-limited partners.[7] We held that non-limited partners occupy positions comparable to those held by officers and directors in a corporation, and interpreted the officer and director restrictions to apply to these partnership interests. Continental argues that the legislative history and the language of the statute do not support extension of the alien ownership restrictions to all general alien partners. Continental contends that general partners who are insulated from management control by a partnership agreement are

not subject to the officer and director restrictions of Section 310(b). A similar argument, however, was considered and rejected in the *Wilner & Scheiner Reconsideration Order*. The petitioner there requested that the Commission grant a statutory exemption to alien non-limited partners who were insulated from involvement in the licensee affairs but who exercise control over other aspects of the partnership business. We declined to do so. In concluding that "insulated" non-limited partners were within the scope of the alien officer and director provisions of Section 310(b), we stated:

> We have no power to accord a statutory "exemption" to a person holding a positional interest otherwise subject to the scope of Section 310(b) because he or she agrees, as a matter of private contract, not to exercise the powers inherent in that position . . . .While the Commission may properly consider the existence of a private contractual relinquishment of managerial powers in determining to grant an exemption from its own administrative rules and policies, we have no power to accord a comparable exemption from a statutorily mandated proscription. Accordingly, we find that "insulated" corporate officers and directors--and their functional equivalents in a partnership--are fully subject to the restrictions governing positional interests contained in Section 310(b).

Wilner & Scheiner Reconsideration Order, 1 FCC Rcd at 15. Moreover, in an analogous context, we have emphasized that the equity benchmarks adopted in Section 310(b) reflect a Congressional concern over the persons or companies controlling Commission licensees even in those circumstances where the alien's ownership interest is noninfluential in nature or does not confer actual control. *PrimeMedia Broadcasting*, 3 FCC Rcd at 4295. Accordingly, the alien ownership restrictions of Section 310(b) applies to all alien general partners,[8] regardless of the insulating nature of the partnership interest.[9]

6. We further find that Continental's application, having been properly returned as defective pursuant to Section 22.20 of the Rules, may not be amended to change its partnership structure from a general to a limited partnership. Having been returned as defective and unacceptable for filing, an application may not be amended after the filing date or after the lottery to bring it into compliance with the Rules. *See* Section 22.918(b); *REM Communication*, 3 FCC Rcd 3705 (1988). The MSD's decision in *GTRW Partnership*, 2 FCC Rcd 4160 (Mob. Serv. Div. 1987) (*GTRW*), cited by Continental, does not require a contrary result. In *GTRW*, the applicant failed to disclose in its application that one of its partners was an alien and incorrectly indicated that the applicant was a general partnership. In a timely filed Section 1.65 amendment, the applicant correctly identified the actual citizenship of the alien limited partner and that the applicant was a limited partnership. In these circumstances, the MSD found that the non-disclosure of the alien citizenship was an inadvertent error, and accepted the amendment to reflect the true ownership of the partnership as it was at the time of filing. As such the MSD's decision to allow the amendment was in accordance with other decisions allowing amendments to correct similar errors. *See Advanced Communications*, 2 FCC Rcd 580 (Com. Car. Bur. 1987); *Burton K. Werner*, 2 FCC Rcd 1484 (Com. Car. Bur. 1984). Continental, however, does not claim that the partnership was erroneously listed as a general partnership. In fact, it admits that the applicant was originally a general partnership. Continental attempts to amend a defective application to reflect a change in partnership structure in order to bring the application into compliance with the alien ownership rules. This constitutes an impermissible amendment, and will not be accepted.

III. ORDERING PARAGRAPH

7. ACCORDINGLY, IT IS ORDERED, pursuant to Section 1.106 of the Commission's Rules, that the petition for reconsideration filed by Continental Cellular, for its application in Alaska 2 - Bethel RSA, File No. 10003-CL-P-316-A-88, IS DENIED.

8. IT IS FURTHER ORDERED, that the amendment submitted by Continental Cellular to its application in Alaska 2- Bethel RSA, File No. 10003-CL-P-316-A-88, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Pursuant to 47 C.F.R. §1.106(a)(1), the petition for reconsideration has been referred to the Commission for consideration.

[2] *Public Notice*, Report No. CL-88-168 (released September 27, 1988).

[3] 47 C.F.R. §22.4. Section 22.4(b) provides, in pertinent part, that, "An authorization may not be granted to or held by . . . (3) [a]ny corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives . . . ."

[4] 47 U.S.C. §310(b) (1982). Section 310(b) provides, in pertinent part, that, "No broadcast or common carrier . . . radio station license shall be granted to or held by . . . (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives . . . ."

[5] In its petition for reconsideration, Continental disputes this conclusion. Because we are denying Continental's petition on other grounds, we do not find it necessary to address this contention in this order.

[6] Continental states that pursuant to its general partnership agreement, management control of the partnership is concentrated in a single managing partner. This partner, a U.S. citizen, is the only partner with authority to make management decisions and bind the partnership.

[7] "Non-limited partners" is defined to encompass both the partners in a partnership without limited partners and the general partners in a limited partnership. *Reconsideration Order*, 1 FCC Rcd at note 4.

[8] Limited partners are treated as stockholders for purposes of a Section 310(b) analysis. *Wilner & Scheiner*, 103 FCC 2d at 520. Thus, Section 310(b)(3) prohibits alien limited partners from owning in aggregate more than a 20% interest in a partnership that holds a license.

[9] Even if insulation did remove partners from the restrictions of Section 310(b)(3), the language of Continental's general partnership agreement would be insufficient evidence of such insulation. While the general partnership agreement vests control of the partnership in a single managing partner, *see* note 6 *supra*, it, by its terms, neither specifically excludes alien general partners from involvement in the management or operation of the partnership, nor precludes an alien partner from holding the position of managing partner.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANTAGE COMPANIES, INC.
and Its Subsidiaries
Transferor,

and I-T-C-90-008-TC

LDDS COMMUNICATIONS, INC.
Transferee,

Application for Authority to Transfer
Control of Advantage Companies, Inc.

MEMORANDUM, OPINION AND ORDER

Adopted: January 31, 1990; Released: February 5, 1990

By the Chief, International Facilities Division:

1. On October 20, 1989, Advantage Companies, Inc. (ACI (formerly Advantage Network, Inc)) and its subsidiaries[1] and LDDS Communications, Inc. (LDDS) filed an application requesting authority to transfer the Section 214 international resale authorization of ACI to LDDS in connection with the merger of the two companies. The parties also requested additional authority to resell international switched voice service to each of the ten subsidiaries of the entity formed by the merger of ACI and LDDS. On January 19, 1990, the parties filed an amendment and supplement to their application withdrawing the request, without prejudice, for additional Section 214 authority. The original application was placed on public notice October 25, 1989. No comments were received.

2. The parties state that LDDS is a Delaware corporation headquartered in Jackson, Mississippi, holding several subsidiary companies[2] which are leading providers of domestic long distance services. LDDS' subsidiaries had consolidated revenues of over $53 million in 1988 and offer telecommunications service throughout the southern and midwestern regions of the United States, including Mississippi, Georgia, Missouri, Tennessee, Arkansas, Indiana, Kansas, Kentucky, Texas and Alabama.

3. ACI, a publicly held Tennessee corporation, provides domestic long distance service as a nondominant carrier subject to regulatory forbearance under the Commission's *Competitive Carrier* policies, according to the parties. ACI, as Advantage Network, Inc., began service as an international resale carrier in 1988. [3] ACI's customers include large and small business customers located primarily in Texas, Kentucky and Tennessee.

4. The parties state that on August 14, 1989, ACI and LDDS consumated a merger, on a provisional basis, conditioned on receiving requisite regulatory approvals. This merger, the parties explain, is based on a determination by ACI and LDDS that significant operational, financial and marketing advantages will be realized by merging and restructuring their businesses to create an integrated group of companies to provide domestic long distance service as well as international switched voice service to customers throughout the United States. Under the Plan of Reorganization and Agreement of Merger, ACI and LDDS will merge and a majority of the shares of the surviving corporation (74.3 percent) will be owned by LDDS' shareholders. As a result of the merger, control of ACI and its Section 214 international resale authorization will be transferred to LDDS. The parties requested and received special temporary authority to transfer ACI's international resale authorization to LDDS to avoid disruption of service to ACI's existing customers.[4]

5. Upon review of the application, we find that the acquisition will offer some benefits to ACI's customers and will not entail substantial changes in ACI's service. The merger and restructuring will offer significant operational, financial and marketing advantages to long distance customers through the United States, while at the same time facilitating expansion of the current customer bases.

6. We must also address the issue of whether this transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[5] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engage in wire or radio communications or radio transmissions of energy."[6] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act of 1934, as amended, "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[7] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both ACI and LDDS are non-dominant carriers and this proposed transaction does not appear to adversely impact the marketplace.

7. In view of the foregoing, we conclude that LDDS' acquisition of the Section 214 authority held by ACI will serve the public interest.

8. Accordingly, IT IS ORDERED that the application of Advantage Companies, Inc. and its subsidiaries and LDDS Communications, Inc., File No. I-T-C-90-008-TC, IS GRANTED and LDDS is authorized to acquire the Section 214 authorization in File No. I-T-C-88-099 from ACI.

9. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of execution.

10. IT IS FURTHER ORDERED that LDDS shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commissions Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

11. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1988)

12. IT IS FURTHER ORDERED that LDDS is limited, under this order, to the provision of international switched voice resale services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the U.S. and those points listed in aforementioned tariffs.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] ACI states that the subsidiaries of ACI include Advantage Long Distance, Inc. and American Pioneer Telephone of Texas, Inc.

[2] LDDS indicates that its subsidiaries include LDDS of Alabama, Inc., LDDS of Arkansas, Inc., LDDS of Indiana, Inc., LDDS of Kansas City, Inc., LDDS of Kentuckey, Inc., LDDS-II, Inc., Com-Link 21, Inc. and LDDS of Tennessee, Inc.

[3] Advantage Network, Inc., 3 FCC Rcd 3612 (1988).

[4] TAO-1537 (September 15, 1989).

[5] 15 U.S.C. Section 18.

[6] 15 U.S.C. Section 21.

[7] United states v. FCC, 652 F.2d 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC. File No. I-T-C-89-171-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer control of international resale authorizations.

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1990; Released: February 5, 1990

By the Chief, International Facilities Division:

I. INTRODUCTION

A. *Background*

1. On September 22, 1989, Com Systems, Inc. (Com Systems) and Omnicorp International B.V. (Omnicorp) filed an application with the Commission seeking authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, to transfer control of Com Systems and its Section 214 authorizations to Omnicorp. The application was placed on Public Notice on October 11, 1989. American National Telecom, Inc. (ANT) filed comments seeking return of the application as deficient.

2. Com Systems is a publicly held California corporation that operates as a domestic and international resale carrier. Com Systems currently provides international switched voice resale services under two Section 214 authorizations[1] issued pursuant to the streamlined regulatory requirements established for non-dominant international carriers in the *International Competitive Carrier* proceeding, 102 F.C.C. 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986). Com Systems also provides domestic services in accordance with the Commission's decisions in its domestic *Competitive Carrier* proceedings, which authorize non-dominant carriers to provide interstate services without specific Section 214 authority.[2]

3. Omnicorp International B.V. (Omnicorp) is a corporation organized under the laws of the Netherlands. Omnicorp currently owns, through its wholly-owned subsidiary Omnicorp Holdings, Inc., a Delaware corporation, a 34.52 percent in Com Systems. [3] Omnicorp itself is, in turn, a wholly-owned subsidiary of Omni Holding AG, a publicly held, multi-national corporation organized under the laws of Switzerland. The largest single shareholder of Omni Holding AG is Mr. Werner K. Rey, a citizen of Switzerland, who owns approximately 80 percent of its shares.

B. *The Purchase Agreement*

4. The proposed transaction contemplates the acquisition by Omnicorp of a majority interest in Com Systems. Pursuant to a preferred stock purchase agreement between the parties, Com Systems will issue and sell 4.5 million shares of Com Systems Series C cumulative convertible voting preferred stock to Omnicorp at a purchase price of approximately $9 million. Following completion of the transaction, Omnicorp will own approximately 52.52 percent of the voting stock of Com Systems, assuming conversion of certain convertible interests into common shares. Moreover, Omnicorp will enter into a voting agreement with three Com Systems shareholders that currently own 48.3 percent of the outstanding shares of Com Systems stock. The voting agreement will allow Omnicorp to vote the shares of these shareholders. Consequently, Omnicorp also will designate a majority of the directors on the Com Systems board of directors.

II. SUMMARY OF COMMENTS

5. On November 13, 1989, American National Telecom, Inc. (ANT) filed comments seeking return of the application to Omnicorp and Com Systems as deficient. ANT, an international common carrier providing switched voice services, states that it has been a customer of Com Systems and more recently has become a competitor. ANT notes that it has filed suit against Com Systems in California Superior Court alleging that it was subject to overcharges and deficient services, and that Com Systems has filed a complaint alleging that ANT owes certain sums to Com Systems. Because of these circumstances, ANT states that it has an interest in ensuring that the proposed transaction complies with Commission requirements and does not provide Com Systems with an impermissible competitive advantage. ANT contends that the instant application is deficient because it believes the applicants have made no showing that Com Systems qualifies as a non-dominant carrier under the Commission's *International Competitive Carrier* policies. In particular, ANT states that the applicants have not demonstrated that the ultimate corporate parent of Com Systems under the proposed transaction, Omni Holding AG, is not a foreign telecommunications entity whose purchase of Com Systems' stock would cause Com Systems to be classified as a foreign-owned dominant carrier under these Commission policies.

6. ANT also argues that the application is deficient because its description of the proposed transaction is too indefinite for Commission review and approval. Specifically, ANT is concerned about apparent inconsistencies between the application and a Securities and Exchange Commission filing with respect to the ownership share Omnicorp currently holds in Com Systems[4] and the allegedly incomplete status of the Preferred Stock Purchase Agreement submitted with the application. ANT finds these alleged discrepancies "particularly worrisome" in light of a recent judicial determination that another entity controlled by Werner K. Rey, the majority sharholder of Omni Holding AG, apparently engaged in intentional, material nondisclosures in connection with another transaction.

7. On November 29, 1989,[5] Com Systems responded that ANT's allegations that Com Systems should be subject to dominant carrier regulation are inappropriate in the context of a transfer of control proceeding. It further

contends that its application fully addresses the nature of the foreign interests in Omni Holding AG. It also advises that its application expressly states that the 34.52 percent ownership figure was not derived pursuant to SEC Rule 13d-3(d), whereas the 40.3 percent figure it submitted to the SEC followed this rule. With respect to the alleged incomplete status of its Preferred Stock Purchase Agreement, Com Systems states that Section 1.65 of the Commission's Rules, 47 C.F.R. §1.65, would require it to report any material changes. Finally, as to litigation referenced by ANT, Com Systems states that it is unrelated to the instant application and involved merely a temporary restraining order issued after abbreviated hearing. Com Systems suggests that ANT's pleading was filed merely to delay the instant application and advance ANT's position in collateral private litigation.

8. On January 10, 1990, Com Systems filed with the Commission a letter stating that it accedes to dominant carrier status and the relevant dominant carrier regulatory requirements for its international services to facilitate a more expeditious grant of its pending application. Com Systems also provided an executed copy of its November 21, 1989 Preferred Stock Purchase Agreement with Omnicorp International B.V. *See* January 10, 1990 letter from Andrew D. Lipman, Counsel for Com Systems, to Secretary, FCC.

III. DISCUSSION

9. Our review of the record shows that the grant of the application will serve the public interest by permitting Com Systems to continue as a competitive provider of international switched voice services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[6] In light of the fact that Com Systems has experienced a negative cash flow since late 1988, we believe that the proposed stock transaction could provide Com Systems with funding essential to maintain a healthy financial condition, avoid service disruption to existing customers, and expand its services and customer base.

10. Moreover, we note that the concern expressed by ANT with regard to the regulatory status of Com Systems as a dominant firm for the provision of international common carrier service operations does not go to the issue whether the transaction *per se* is in the public interest. *See, e.g., Western Union Corporation and World Communications, Inc.*, 4 FCC Rcd 2219, 2221 (Com. Car. Bur. 1989)(*Worldcom*). In any event, in light of Com Systems' letter of January 10, 1990, ANT's allegation becomes moot, and we will follow the Bureau's holding in *Worldcom* to condition our grant of the instant application on Com Systems' classification as a dominant carrier in its provision of international common carrier services absent an express determination by the Commission that Com Systems is non-dominant.

11. Similarly, we do not believe that ANT's remaining contentions are of any decisional significance concerning our decision to grant the Com Systems and Omnicorp request.[7] As Com Systems notes in its Reply, its instant application expressly states that the 34.52 percent figure is not based on SEC Rule Section 13d-3(d), whereas the 40.3 percent figure it submitted to the SEC followed this rule. In any case, the difference between a 34.52 percent and 40.3 percent current ownership interest, or similar numerical differences for post-transaction interests, is not significant under the circumstances of this application where Com Systems concedes dominant status and its position as a competitive provider of international services is not otherwise questioned. In addition, the finalized Preferred Stock Purchase Agreement does not differ materially from the draft agreement submitted with Com Systems' September 22, 1989 application. This filing moots ANT's claim that the application is deficient for lack of a signed agreement.

12. In addition to our regulatory review under the Communications Act, we are charged with the responsibility of reviewing the proposed transaction in light of the provisions of Section 7 of the Clayton Act. Section 7 proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[8] Under Section 11 of the statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[9] The courts have construed this to mean that the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[10] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. As noted above, the proposed transaction will allow an existing competitor in the international services market to remain financially healthy. It will not lessen competition nor increase concentration. Thus, our Clayton Act review does not indicate that the proposed transaction will in any way substantially lessen competition or tend to create a monopoly in any line of commerce. Our conclusion in this regard is further substantiated by the statement in Com Systems' January 10, 1990 letter that, as of December 15, 1989, the Department of Justice and the Federal Trade Commission granted early termination of the waiting period for Com Systems' Hart-Scott-Rodino filing.

13. In view of the foregoing, we find that the public convenience and necessity will be served by approving the instant application.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the application of Com Systems and Omnicorp, File No. I-T-C-89-171-TC, for transfer of control of Com Systems to Omnicorp IS GRANTED.

15. IT IS FURTHER ORDERED that this grant is subject to the condition that Com Systems will be classified as dominant in the provision of international switched voice resale services absent an express determination by the Commission that Com Systems is non-dominant.

16. IT IS FURTHER ORDERED that the grant is subject to the condition the Com Systems shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services within 90 days from the end of each calendar quarter and that Com Systems shall file

annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

17. IT IS FURTHER ORDERED that Com Systems shall file copies of any operating agreement entered into by itself or its parent/affiliate within 30 days of its execution.

18. IT IS FURTHER ORDERED that Com Systems shall file annual traffic and revenue reports as provided for in CC Docket 86-494 concerning traffic originating or terminating within the United States.

19. IT IS FURTHER ORDERED that Com Systems shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for international services originating or terminating in the United States.

20. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Com Systems, Inc., 2 FCC Rcd 582 (Int. Fac. Div. 1987); International Telecharge, Inc. *et. al*, 2 FCC Rcd 1782 (Int. Fac. Div. 1987).

[2] *See* Competitive Carrier, 91 F.C.C. 2d 59 (1982).

[3] Specifically, Omnicorp, through its subsidiary, owns 80.65% of Com Systems Series A Preferred Stock convertible into 3,333,333 shares of common voting stock and 400,000 warrants exercisable for common shares on a one to one basis, which together constitute 34.52% of all of the shares of Com Systems capital stock calculated on a fully diluted basis and assuming conversion of all outstanding convertible preferred stock and all of Omnicorp's convertible interests. *See* Application at n.1.

[4] ANT states that although the application advises that Omnicorp holds 34.52 percent of Com Systems, an August 10, 1989 Amendment No. 2 to Schedule 13D of an SEC filing states that Omnicorp owns 40.3 percent of common stock in Com Systems.

[5] On November 27, 1989, the Commission granted Com Systems' request for an extension of time from November 20, 1989 to November 30, 1989 to reply to ANT's pleading. *See* letter to Andrew D. Lipman from Chief, International Facilities Division (Nov. 27, 1989).

[6] *See, e.g.*,the cases cited in *Teltec Saving Communications Co.*, Mimeo No. 3548 (released April 4, 1986) at n.2.

[7] Nor do we find ANT's contention that a company controlled by Werner K. Rey, the major stockholder of the ultimate corporate parent of Com Systems, engaged in intentional nondisclosure of material information in a proposed stock offer to be of any decisional significance herein. Not only is the organizational nexus between Com Systems and this company highly attenuated, but, upon closer examination, it becomes clear that the referenced judicial determination took place in the context of an abbreviated hearing on a request for a temporary restraining order that subsequently was lifted when the information in question was provided to the petitioning parties.

[8] 15 U.S.C. Section 18.

[9] 15 U.S.C. Section 21.

[10] United States v. F.C.C., 652 F.2d 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-90-025

Application for authority to acquire and operate facilities for direct service between the U.S. and Iceland.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 31, 1990; Released: February 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 20, 1989 by MCI Telecommunications Corp. (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Iceland. The application was placed on public notice on November 22, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Iceland by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-025 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 18 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Iceland furnished by MCI's correspondent in Iceland;

b. obtain from AT&T and operate 18 voice-grade circuits in the Etam, WV earth station;

c. lease and operate 18 voice-grade connecting circuits between the Etam, WV earth station and MCI's West Orange, NJ operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and Iceland and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Iceland, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications, Inc. — Transmittal No. 1876

Revisions to Tariff F.C.C. No. 16

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1990; Released: January 30, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 2, 1989, AT&T Communications (AT&T) filed Transmittal No. 1876 to establish rates and regulations in Tariff F.C.C. No. 16 for Government Outbound Calling Plan Option 2 (GOCP2), an outbound telecommunications service for the University of Texas at Austin (UT). Under this Tariff 16 option, outbound long-distance service will be provided from UT's switching system and will enable all users of the system to make long distance calls using AT&T's outbound service. Petitions were filed against this transmittal by ATC/Claydesta, a subsidiary of Advanced Telecommunications Corporation (ATC), US Sprint Communications Company Limited Partnership (Sprint), and the Competitive Telecommunications Association (CompTel). The transmittal is scheduled to become effective on January 31, 1989, on 90 days' notice.

2. GOCP2 was designed specifically for UT, based upon the results of a bidding process in which three non-dominant carriers and AT&T responded to a UT proposal for long distance services. Service under this option is strictly limited to outbound traffic from the UT switching system. UT operates a student resale operation that would permit students and staff to make personal calls via the proposed AT&T service. AT&T projects that a substantial percentage of the UT traffic would consist of such non-administrative calls.

II. SUMMARY OF PLEADINGS

3. ATC and CompTel maintain that this filing violates Section 202(a) of the Act because it is a customer-specific rate offered by a dominant carrier. According to these petitioners, such a rate unreasonably discriminates against similarly-situated customers who cannot benefit from these low rates. For example, they state that students who reside in university housing can take this service through UT while students who reside off-campus cannot obtain the discounted rate. ATC further alleges that citizens of Austin and the rest of the state also are excluded from this plan. ATC Petition at 4; CompTel Petition at 3.

4. In addition, ATC argues that the offering violates the Commission's policy against unreasonable restrictions of resale. ATC notes that the Commission's *Price Cap Order* affirmed this policy.[1] ATC observes that the Commission rejected a transmittal under AT&T's Tariff No. 12 that it found was effectively available only to one customer[2] and a customer-specific offering under Tariff 15 because it could not be justified on the basis of competitive necessity. [3] ATC Petition at 5-6; *see also* CompTel Petition at 2.

5. ATC then argues that AT&T first filed Tariff 16 under that provision of Section 201(b) of the Communications Act which provides for a "government" class of rates. After analyzing the legislative history, ATC concludes that Congress intended to limit the scope of the "Government" classification to the federal government. ATC Petition at 8-9. CompTel concurs with ATC on this point. CompTel Petition at 4. Sprint does not address this issue.

6. Next, ATC objects to the geographic limitations contained in the tariff. This provision, according to ATC, violates Commission policy that rates must be geographically averaged in order to foster universal service. ATC claims that the Commission found that AT&T's original Tariff 12 VTNS Option I was unreasonably discriminatory because it was only available in four LATAs. ATC asserts that geographically deaveraged rates are contrary to Commission policy set out in the *Tariff 12 Order* and the *Price Cap Order* and that the proposed rates are unreasonably discriminatory. ATC Petition at 11-12, CompTel Petition at 2, Sprint Petition at 5-6.

7. Finally, ATC contends that the cost support data submitted by AT&T is deficient. Specifically, ATC asserts that AT&T relies upon a revenue less cost analysis, *i.e* a net revenue standard, although the Commission established in the *Price Cap Order* that Tariff 16 offerings must be justified under traditional tariff review standards. *Id.* at 14 (*citing Price Cap Order*, 4 FCC Rcd at 3034 n. 671). In addition, ATC contends that AT&T's cost support material does not separately identify expenses attributable to GOCP2 and that it is therefore impossible to determine whether all directly assignable expenses are included. ATC also disputes AT&T's assertion that all GOCP2 customers will be new subscribers and that the service therefore will produce no cross-elastic impact on other AT&T services.[4] Sprint argues that the GOCP2 violates the Commission's *Volume Discount Guidelines Order* [5] and should therefore be rejected. Sprint Petition at 3-4.

8. In response to the petitions filed by ATC and Sprint, AT&T states that it is lawful for state governments or their agencies to receive cost-saving, individually-customized services like those which are provided to the federal government. According to AT&T, compensatory specialized government services, like GOCP2, are just, reasonable and not unreasonably discriminatory. Furthermore, AT&T contends that such offerings serve what it claims is the Congressional objective of reducing the cost of government and conserving taxpayers' money. AT&T maintains that the petitioners' opposition to this filing is an attempt by them to "thwart the competitive process, the effect of which would be to raise the rates which the government must pay and taxpayers must bear." AT&T Reply at 4.

9. AT&T disputes ATC's argument that the term "government" in Section 201(b) refers only to the federal government. According to AT&T, state and local governments were eligible for preferential rates under the Interstate Commerce Act (ICA). Further, AT&T argues, Congress evinced no intent to change this situation when it subjected telephone and telegraph services to federal

regulation in the ICA and later in the Communications Act. *Id.* at 5-7. Finally, AT&T argues that even if we conclude that the term "Government" refers only to the federal government, Section 201(b) permits the Commission to recognize other classes it considers just and reasonable. *Id.* at 7 n. **.

10. In addition, AT&T claims that it is not true that GOCP2 is "nothing more than discounted Megacom service," as Sprint contends. According to AT&T, the University of Texas has a great demand for daytime calls of a particular length (in miles), and unlike Megacom, GOCP2 affords "particularly favorable rate treatment" to such calls. *Id.* at 8. Furthermore, according to AT&T, there is no requirement that a government service be unique in order to qualify for favorable rates. Moreover, AT&T maintains that GOCP2 cannot be distinguished from other allegedly similar services that it and other carriers offer to the Federal Government. *Id.* at 9.[6]

11. Finally, AT&T states that its cost support materials are sufficient and meet the requirements of Section 61.38 of the Commission's Rules. While AT&T implies that a net revenue test cannot be used as the sole justification for new services that will eventually be included under price caps and that such services are still subject to conventional tariff support requirements, it claims that a net revenue test can be used "as *part* of its justification in compliance with the conventional requirements of Section 61.38." (Emphasis in original, footnote omitted). *Id.* at 11.[7]

III. DISCUSSION

12. This tariff offering requires us to consider the interplay of Sections 201(b) and 202(a) of the Communications Act. Section 202(a) prohibits carriers from discriminating unreasonably among customers in the "charges, practices, classifications, regulations, facilities, or services" for "like" communication service.[8] Section 201(b) creates an exception to the general prohibition in Section 202(a) by permitting a carrier to establish a separate classification for service to the "Government" for which a carrier may charge "different" rates.[9] The question now before us is the applicability of Section 202(a) to the class of service permitted by Section 201(b).

13. We conclude that Section 201(b) is best understood as creating an exception to Section 202(a) by permitting the establishment of government service regardless of whether such service is "like" other services offered at different rates. We are not persuaded by arguments that the government classification in Section 201(b) is limited to the Federal Government. Section 201(b) does not, however, except from the requirements of Section 202(a) the services provided pursuant to the government service classification. Thus, Section 202(a) prohibits a carrier from discriminating unreasonably among customers of the service provided under the government service classification.

14. In the case before us, AT&T has established in Tariff 16 GOCP service which is a discount on its Megacom service that is available only to government users. Establishment of that service does not violate Section 202(a) by discriminating unreasonably against other Megacom users because Section 201(b) authorizes creation of such a service. The instant transmittal, however, by which AT&T seeks to establish a discount for GOCP service available only to the Austin campus of the University of Texas does discriminate among GOCP customers. AT&T has failed to offer any justification for this discrimination or make any showing that this discrimination is reasonable, nor do we discern on this record any basis for so concluding. There is no evidence that the nature of the service involved or the costs of providing it distinguish in any way the service AT&T proposes to offer in this transmittal from the service AT&T offers other GOCP users. We therefore find that Transmittal No. 1876 violates Section 202(a) and must be rejected as patently unlawful.

IV. CONCLUSION AND ORDERING CLAUSES

15. For the reasons stated above, we conclude that the tariff revisions in Transmittal No. 1876 are patently unlawful because those revisions violate Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). We therefore reject the proposed tariff revisions.

16. Accordingly, IT IS ORDERED that pursuant to Section 202(a) of the the Communications Act, 47 U.S.C. § 202(a), AT&T Tariff F.C.C. No. 16, Transmittal No. 1876 IS REJECTED.

17. IT IS FURTHER ORDERED that the petitions to reject or to suspend and investigate filed by ATC/Claydesta, US Sprint Communications Company Limited Partnership, and Competitive Telecommunications Association ARE GRANTED to the extent provided herein.

18. IT IS FURTHER ORDERED that AT&T Communications SHALL ISSUE revisions to its tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

19. IT IS FURTHER ORDERED that Special Permission No. 90-23 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989).

[2] AT&T Communications, 4 FCC Rcd 4932 (1989).

[3] AT&T Communications, 4 FCC Rcd 7933 (1989).

[4] ATC argues that UT students will use GOCP2 in place of AT&T's generally available interexchange services. *Id.* at 15.

[5] Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984).

[6] AT&T also denies petitioners' claims that GOCP2 violates the Commission's policy disfavoring geographic deaveraging. AT&T argues that GOCP2 does not violate that policy because it threatens none of the concerns underlying the Commission's policy. Rather, AT&T maintains, those goals are protected because nationwide average costs are used to develop rates and

that GOCP2 recovers its costs and contributes to the firms's common costs. *Id.* at 10-11. AT&T also argues that the proposed service does not unreasonably restrict resale. *Id.* at 11, n. **.

[7] The Office of the Attorney General of Texas (Attorney General) filed comments, in the form of a letter, on behalf of UT. The Attorney General generally agrees with AT&T's interpretation of Section 201(b) of the Communications Act. The Attorney General argues further, however, that preferential rates can be offered only if they recover their incremental costs and make a contribution to common costs. Letter from W. Scott McCullough, Asst. Attorney General to Secretary, FCC dated Dec. 15, 1989.

[8] Section 202(a) states as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . .

[9] Section 201(b) provides in pertinent part as follows:

> [A]ny . . . classification . . . that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications subject to this Act may be classified into . . . Government . . . and different charges may be made for the different classes of communications . . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic — Transmittal No. 344
Tariff F.C.C. No. 1

Southwestern Bell — Transmittal No. 1929
Tariff F.C.C. No. 68

Motions to Extend Time

ORDER

Adopted: January 30, 1990; Released: January 31, 1990

By the Chief, Common Carrier Bureau:

1. On January 24, 1990, Metropolitan Fiber Systems, Inc. (MFS) filed motions to extend the due date to February 1, 1990, for pleadings on revisions to averaged rate structures for DS3 services filed in the above-captioned transmittals. MFS argues that the one-week period established by the Common Carrier Bureau for review of the filings does not provide adequate time to analyze the proposed rate revisions, in light of the volume of tariff revisions required by the *ICB Order*.[1]

2. The Bureau has reviewed the petitions filed by MFS and has concluded that the public interest would be served by the grant of the petitions.

3. Accordingly, IT IS ORDERED that the motions for extension of time filed by Metropolitan Fiber Systems, Inc., with regard to the above-captioned transmittals ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, released Dec. 18, 1989 (*ICB Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-441

In the Matter of

Advanced Technologies for the
Public Safety Radio Services

ORDER EXTENDING COMMENT AND REPLY COMMENT PERIODS

Adopted: January 29, 1990; Released: February 6, 1990

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On November 28, 1989, the Commission adopted a *Further Notice of Inquiry* (*Further Notice)* in the above-captioned proceeding. The specified deadlines for comments and reply comments were March 16, 1990 and April 13, 1990, respectively.

2. On January 23, 1990, the Land Mobile Communications Council (LMCC) filed a motion to extend these deadlines to May 15, 1990 and July 15, 1990, respectively. In justifying this request, LMCC noted that the *Further Notice* was one of several recent Commission proceedings released with comment and reply comment deadlines occurring between February and April of 1990. LMCC indicated that many of its members will be filing comments in all of these proceedings, but that the close spacing of the comment and reply comment deadlines could prevent a complete review and study of the important issues raised. LMCC, therefore, requests that additional time be allowed to enable the land mobile industry to present the Commission with a more thorough set of comments and reply comments in this proceeding.

3. We agree that such extensions would enable the members of the land mobile community to prepare more thorough comments and would provide the Commission with a more complete record in this proceeding. We conclude, therefore, that a grant of the motion for extension of time is in the public interest. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that the deadline for filing comments in the subject *Further Notice of Inquiry* is extended to **May 15, 1990,** and the deadline for filing reply comments is extended to **July 16, 1990.**

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben, Chief
Land Mobile and Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-553

In the Matter of

Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool — RM-6724

Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems In Rural Markets

ORDER EXTENDING COMMENT AND REPLY COMMENT PERIODS

Adopted: January 29, 1990; Released: February 6, 1990

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On November 28, 1989, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) in the above-captioned proceeding. The specified deadlines for comments and reply comments were February 26, 1990 and March 28, 1990, respectively.

2. On January 23, 1990, the Land Mobile Communications Council (LMCC) filed a motion to extend these deadlines to April 15, 1990 and June 1, 1990, respectively. In justifying this request, LMCC noted that the *Notice* was one of several recent Commission proceedings released with comment and reply comment deadlines occurring between February and April of 1990. LMCC indicated that many of its members will be filing comments in all of these proceedings, but that the close spacing of the comment and reply comment deadlines could prevent a complete review and study of the important issues raised. LMCC, therefore, requests that additional time be allowed to enable the land mobile industry to present the Commission with a more thorough set of comments and reply comments in this proceeding.

3. We agree that such extensions would enable the members of the land mobile community to prepare more thorough comments and would provide the Commission with a more complete record in this proceeding. We conclude, therefore, that a grant of the motion for extension of time is in the public interest. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that the deadline for filing comments in the subject *Notice* is extended to **April 16, 1990**, and the deadline for filing reply comments is extended to **June 1, 1990.**

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben, Chief
Land Mobile and Microwave Division
Private Radio Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 1, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PUERTO RICO COMMUNICATIONS AUTHORITY'S PETITION FOR WAIVER OF EQUAL ACCESS PRESUBSCRIPTION BALLOTING REQUIREMENTS

On January 26, 1990, the Puerto Rico Communications Authority (PRCA) filed a petition for waiver of the Commission's equal access presubscription balloting requirements to permit use of its proposed equal access conversion and balloting schedule. PRCA states that the proposed timeline is "identical in all material respects to the conversion and balloting timetable recently approved . . . for PRTC" in the *PRTC Equal Access Waiver Order*, DA-89-1676, released December 29, 1989. PRCA seeks a waiver of the equal access presubscription and balloting requirements, similar to that granted to PRTC in the *PRTC Equal Access Waiver Order*, to enable it to require off-island carriers to order equal access from PRCA end offices more than 120 days prior to conversion of those end offices to equal access. PRCA states that it seeks the waiver so that the transition to equal access for PRTC and PRCA can occur contemporaneously, thereby significantly reducing the potential for customer confusion, and increasing efficiency. PRCA states that this almost simultaneous conversion will allow PRCA and PRTC to proceed at the same time with educational campaigns, and use the same consultants and experts to coordinate the process. PRCA also states that it has met with all off-island carriers known to be interested in equal access for Puerto Rico off-island service, and that they have expressed support for the plan.

Interested parties are to file comments on the PRCA petition by **February 16, 1990,** and reply comments by **February 23, 1990.** Comments and reply comments are to be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Two copies of all comments and reply comments are to be sent to Rose Crellin, FCC, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington D.C. 20554, and to the Commission's contractor for public records duplication, International Transcription Services (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS by calling (202) 857-3800. The PRCA petition for waiver as well as the comments and replies in this proceeding are also available for inspection and duplication in Room 544, 1919 M St. N.W., Washington D.C.

For further information contact Rose Crellin, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-9342.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corporation,
Complainant,

v. File No. E-87-65

New York Telephone Company,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 1990; Released: February 5, 1990

By the Commission:

1. On June 22, 1987, MCI Telecommunications Corporation (MCI) filed a complaint against New York Telephone Company (NYT) alleging that the interstate high capacity special access (HiCap) rates charged by NYT for HiCap connections for the period October 1985 through October 1987 are unlawful. NYT denies the allegations and moves that the complaint be dismissed. For the reasons discussed below, we deny the complaint.

I. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. MCI asserts that for the period in question NYT targeted its HiCap service to earn a rate of return of 59.68 percent. According to MCI, the Commission has determined that charges for special access services earning a rate of return in excess of 40 percent are unlawful. It therefore concludes that NYT's HiCap rates are unjust and unreasonable, in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). In support, MCI cites the Common Carrier Bureau's order of May 29, 1987, *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase II, Part I, 2 FCC Rcd 3507 (Com. Car. Bur. 1987)(*May 29 Bureau Order),* which found unlawful special access service rates proposed by certain local exchange carriers (LECs) in the Annual 1987 Access tariffs, which were targeted to earn rates of return greater than 40 percent. MCI states that NYT's rates were not included in that order, and thus were not subject to rejection, because NYT had not proposed changing the rates in its Annual 1987 Access filing. MCI asserts that it is dependent on NYT for high capacity special access service and must pay excessive charges for this service because of NYT's excessive rates.

3. In its Answer and Motion to Dismiss,[1] NYT denied that it is earning a 59.68 percent rate of return on HiCap service. It explains that that figure was only a projected rate of return for 1987 based upon a limited, disaggregated cost study submitted in October 1986 as part of its Annual 1987 Access filing. It emphasizes that the 59.68 percent figure provides no indication of actual earnings. Furthermore, NYT denies that the Commission has ruled that special access charges earning in excess of a 40 percent rate of return are *per se* unlawful. According to NYT, the 12 percent 1987 "authorized" rate of return figure was for special access as a whole for 1987, and the Commission's rules do not require that each subelement be targeted to earn the precise authorized rate of return.[2]

4. As affirmative defenses, NYT argues that the reasonableness of its HiCap rates is the subject of a pending investigation in CC Docket No. 85-166, Phase II, and MCI should not be permitted to litigate the same issues already awaiting a Commission decision. Further, it argues that its HiCap rates were reasonable at all times, and notes that the Commission has recognized that consideration of market factors, in addition to cost data, is appropriate. Finally, NYT maintains that even assuming, *arguendo*, that all or part of its HiCap rates were found to be unlawful, refunds are not justified since, as a whole, NYT's Special Access category earned only a 5.38 percent rate of return for the period from October 1985 through December 1986, well below the 12.75 percent authorized.

5. On March 7, 1988, NYT filed a motion to accept supplemental information. NYT explained that after the pleadings were filed in this proceeding, it prepared its Annual 1988 Access Tariff Filing which contained information material and relevant to the resolution of this complaint. [3] In December 1988 the Commission released a decision completing the main phase of its investigation of strategic pricing of selected special access services by local exchange carriers. *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase II, Part 1, 4 FCC Rcd 4797 (1988)(*Strategic Pricing Order)*. Thereafter, Common Carrier Bureau staff asked the parties to submit supplemental briefs in this complaint proceeding.

6. In its Supplemental Brief, MCI reiterates its argument that HiCap rates targeted to earn 59.68 percent are unlawfully high. Further, it asserts that a complaint action, brought under 47 U.S.C. § 208 of the Act, is not barred because an investigation is underway pursuant to 47 U.S.C. §§ 201-205. Finally it contests NYT's argument that "so long as the entire Special Access category is not designed to earn in excess of the prescribed rate of return, the rates for its individual services are irrelevant." Brief at 5. MCI contends that strategic pricing of particular services is unlawful.

7. MCI maintains that the "proposed guidelines" of CC Docket No. 85-166 have no impact on this complaint. It argues that they were not in effect during the period 1985 through October 1987, the period complained of, nor has NYT put information into the record in that docket concerning the reasonableness of its rates during that time. On the other hand, MCI concludes that it has proved that NYT designed its rates to earn 59.68 percent, "far in excess of the 40 percent rate that the Commission stated would be unreasonable on its face."[4] Brief at 7-8, citing *May 29 Bureau Order*, at paras. 17, 21. Recognizing that the Commission allowed strategic pricing under certain circumstances, MCI revised its prayer. Its original complaint requested damages of overpayments above NYT's allowed 12 percent rate of return. It now requests an amount equal to the difference between the rates charged MCI for HiCap service and what NYT would have collected if it had set its rates to earn the 40 percent rate of return "described as a maximum by the Commission in its May 29 Order." Brief at 9. MCI concludes that "[b]ecause the request for damages is so clearly fair in

view of the Commission's May 29 Order, it is not necessary to examine the different cost allocation methodologies that might have been employed in this simple proceeding. The fact is that at the time NYT determined to target these rates it did so on certain earnings assumptions."[5] Brief at 8.

8. In its Brief on Behalf of New York Telephone Company (Opposition Brief), responding to MCI's Supplemental Brief, NYT reiterates arguments advanced in its earlier pleadings. It again argues that the complaint should be dismissed because the same issues are under investigation in CC Docket No. 85-166, and states that all of the rates at issue in this complaint are under an accounting order, subject to refund if the Commission concludes in that docket that the rates were unlawful. Therefore, it asserts that even if the complaint is not barred as a matter of law, it should be dismissed "as a matter of logic, equity and administrative economy." Opposition Brief at 4. In addition, it asserts that the Commission's decision in *Strategic Pricing Order* confirmed NYT's arguments "that just and reasonable rates must consider factors other than cost and that rate of return is an unreliable measure of cost." Opposition Brief at 6. It states that in that decision the Commission "declined to follow the rate of return 'range of reasonableness' of 40% suggested by the Bureau in the May 29 Order relied upon by MCI." *Id.* NYT contends that in holding that a rate of return calculation for subcategories of Special Access service is not the proper benchmark of a just and reasonable rate, the Commission totally repudiates MCI's claim in this complaint. Moreover, NYT asserts, in that decision the Commission rejected rate of return data filed in the Annual 1987 Access Tariff Filing, the only evidence offered by MCI. NYT also rejects MCI's contention that the *Strategic Pricing Order* applies only to future HiCap rates. It notes that in that order the Commission directed carriers whose rates were under investigation in that docket to file a direct case showing how their rates satisfy the new guidelines, and that NYT complied with a pleading filed January 10, 1989. Opposition Brief at 9, referring to ¶ 60 of *Strategic Pricing Order*. Finally, NYT disagrees with MCI's proposed measure of damages. Besides contending that its rates were just and reasonable, it contends that the proposed damages of the amount in excess of the 40 percent rate of return suffers the same infirmity discussed previously, that the "Commission has conclusively established that subcategory rates of return cannot be employed as the determinant of just and reasonable rates." Opposition Brief at 10. In light of the above, NYT urges that the complaint be dismissed.

9. In its Reply Brief MCI reiterates arguments advanced previously, relying on its interpretation of the *May 29 Bureau Order*, and noting that NYT's rates were not reviewed in that order, but remained in effect, because of a "technicality." MCI reasserts that its claim should be decided in this proceeding, not in the strategic pricing investigation (CC Docket No. 85-166). It claims that NYT has not rebutted "the fact that rates designed to yield a rate of return of 59.68% are unlawful." Reply Brief at 5. It rejects NYT's claim that the rates for individual services are irrelevant as long as the rates for the entire Special Access category are designed to earn only the prescribed rate of return. MCI concludes that neither the Commission's orders, nor its rules, nor the Communications Act suggest "that rates for a distinguishable separate service can grossly exceed a carrier's prescribed rate of return." *Id.* at 6.

II. DISCUSSION

10. The Commission has been investigating the strategic pricing by LECs of selected special access rates, including the NYT HiCap rates that are the subject of MCI's complaint in the instant proceeding.[6] During the course of that investigation, the Commission determined, as a general matter, that the Act and its Rules permit the LECs to consider factors other than cost in developing special access rates.[7] The Commission also decided not to evaluate the specific strategically priced special access rates under investigation using the approach employed by the Common Carrier Bureau in its *May 29 Bureau Order*, on which MCI relies so heavily, but instead established a set of guidelines. This Commission has now reaffirmed the application of those guidelines to the specific rates and for the specific time period under investigation.[8]

11. We have now decided in the tariff investigation that NYT's use of strategic pricing during the relevant period was justified and reasonable.[9] In making that determination, we considered evidence offered by MCI but concluded that other evidence and arguments offered by NYT provided adequate justification for its strategically-set rates.[10] Our finding in the tariff investigation controls the disposition of the instant complaint.[11] Accordingly, MCI's complaint is denied.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the complaint filed June 22, 1987, by MCI Telecommunications Corporation against New York Telephone Company IS DENIED.

13. IT IS FURTHER ORDERED that the Motion to Dismiss filed by New York Telephone Company IS DISMISSED as moot.

14. IT IS FURTHER ORDERED that the Motion of New York Telephone Company to Accept Supplemental Information IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In light of our denial of the complaint, we dismiss this motion as moot.

[2] Moreover, it states, for the period from October 1985 through December 1986, that authorized rate was set at 12.75 percent.

[3] That motion is unopposed. In the interest of having a complete record before the Commission, we will grant the motion. In its supplemental pleading NYT states that if it had used the methodology used by the rest of the industry in 1987, its return on HiCap services would have been 10.5% rather than the 59.68% figure projected.

[4] MCI also contends that NYT should have filed for a waiver of Part 69 of the Rules since it targeted its HiCap rates to earn above the prescribed rate of retun, citing GTE Telephone Operating Companies, Revision to Tariff F.C.C. No. 1, Transmittal No. 401, 3 FCC Rcd 5280 (1988). The Bureau stated there that GTE should have filed a request for waiver of Part 69 requiring the targeting of each rate element to the authorized return. However, that case involved switched access rate elements. As we stated in the *Strategic Pricing Order*, "special access subelement rates [are] to be targeted to recover the annual revenue requirement for the special access category as a whole at the authorized rate of return. The rules do not require carriers to target individual special access subelements to earn any specific rate of return." 4 FCC Rcd 4797.

[5] MCI contends if NYT wishes to present evidence of actual experienced returns, then the burden would be on NYT to show that anything above 12 percent is justified, and the measure of damages would be the amount NYT earned over what the Commission determined was appropriate.

[6] Although MCI argued that NYT's rates at issue here were not under investigation and that the 1988 *Strategic Pricing Order*, which adopted guidelines, applied only to future HiCap rates, tariffs for special access services filed by the LECs were under investigation before the 1987 *May 29 Bureau Order* relied on by MCI. Annual 1985 Access Tariff Filings, Mimeo No. 7401 (released Sept. 30, 1985). Moreover, the *Strategic Pricing Order* did not apply just to future HiCap rates. In that order the Commission directed carriers whose rates had taken effect subject to Docket No. 85-166, including NYT, to file supplementary direct cases showing how the rates under investigation satisfied the new guidelines.

[7] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order), recon.* FCC 89-330 (released _____), _____ FCC Rcd _____ (1989) (*Strategic Pricing Reconsideration).*

[8] *Strategic Pricing Reconsideration, supra* note 7.

[9] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, FCC-89-331 (released _____), _____ FCC Rcd _____ (1989).

[10] *Id.*

[11] MCI is not prejudiced by this result. MCI participated fully in the tariff investigation and has not provided any additional information here.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Section 36.154 (a)
of the Commission's Rules

ORDER

Adopted: January 26, 1990; Released: January 26, 1990

By the Chief, Common Carrier Bureau:

1. In this Order, we waive until March 14, 1990, implementation of the amendments to Section 36.154 (a) of the Commission's Rules delineating the separations treatment of mixed use special access lines, *i.e.*, special access lines carrying both interstate and intrastate traffic.[1]

2. The Commission adopted these separations changes based on recommendations prepared by the Federal-State Joint Board in CC Docket No. 80-286.[2] The Joint Board concluded that direct assignment of the cost of mixed use special access lines is preferable to allocating the cost of each special access line between the state and interstate jurisdictions. [3] The Joint Board further recommended that mixed use special access lines carrying *de minimis* amounts of interstate traffic be directly assigned to the intrastate jurisdiction.[4] Special access lines carrying more than a *de minimis* amount of interstate traffic would be assigned to the interstate jurisdiction under the Joint Board proposal. In adopting the Joint Board recommendations, the Commission established January 28, 1990, as the effective date for this change in the separations rules.

3. The local exchange carriers filed tariff revisions implementing the separations rule changes on December 14, 1989. Aeronautical Radio, Inc., Allnet Communication Services Inc., and the Ad Hoc Telecommunications Users Committee filed petitions to reject or suspend a number of these tariff filings.[5] We have directed all local exchange carriers to extend the effective date of the tariffs to March 14, 1989, in order to allow sufficient time for consideration of the various challenges to the tariffs.[6] Accordingly, we waive implementation of the revised separations rules until March 14, 1989, so that the required date for their implementation will coincide with the currently scheduled effective date of the tariffs.

4. Accordingly, IT IS ORDERED, that, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, implementation of the amendments to Section 36.154 (a) IS WAIVED until March 14, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 36 of the Commission's Rules and Establishment of a! Joint Board, *Decision and Order*, 4 FCC Rcd 5660 (1989).

[2] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 4 FCC Rcd 1352 (1989).

[3] Direct assignment involves assigning the entire cost of each mixed use special access line to either the state or federal jurisdiction. On the other hand, under an allocation-based approach, the cost of each mixed use line would be divided between the jurisdictions.

[4] Under the Joint Board recommendation, the interstate traffic on a special access line would be deemed *de minimis* when it amounts to 10 percent or less of the total traffic on the line.

[5] The Ad Hoc Telecommunications Users Committee (Ad Hoc) has also filed a motion to postpone until July 1, 1990, the effective date of the amendments to Section 36.154 (a) of the Commission's Rules. Motion to Postpone the Effective Date of Amendments to Section 36.154 (a) of the Commission's Rules, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, filed December 7, 1989. In its motion, Ad Hoc argues, among other things, that there are a number of unresolved questions concerning the requirements of Section 36.154 (a), as revised. Petition at 2. Aeronautical Radio, Inc. and the Pacific Companies (PacTel) filed comments on Ad Hoc's motion on December 18, 1989, and December 21, 1989, respectively. PacTel also sought extension of the effective date of the separations changes until July 1, 1990, as part of its petition for reconsideration of the rule changes. Petition for Reconsideration, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, filed September 1, 1989. The Commission will rule on these filings at a later date.

[6] *See, e.g.*, Letter from John Cimko, Chief Tariff Division to James W. Frame, Director of Tariff and Regulatory Matters, National Exchange Carrier Association, January 25, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Revisions to Tariff F.C.C. No. 9 — Transmittal No. 1874

Financial Communications Arrangement

ORDER

Adopted: January 31, 1990; Released: January 31, 1990

By the Chief, Common Carrier Bureau:

1. By the captioned transmittal, filed November 2, 1989, and scheduled to become effective January 31, 1990, American Telephone and Telegraph Company (AT&T) establishes in its Tariff F.C.C. No. 9 a private line service between New York and Chicago, styled Financial Communications Arrangement (FCA). New England Telephone and Telegraph Company (NET) and New York Telephone Company (NYT) on November 17, 1989, filed a joint petition as the NYNEX Telephone Companies (NYNEX) to reject or suspend the offering, and AT&T filed its reply November 30, 1989.

2. FCA is a voice-grade, private line ringdown service provided between areas of Manhattan served by Teleport of New York and areas of Chicago served by Metropolitan Fiber Systems of Chicago. The rate for FCA is stated as a single element for end-to-end service between customer premises, and so combines access and interoffice elements that are provided under separate tariffs by AT&T's existing offerings. AT&T states that its reliance on these alternative access vendors (AAVs) enables a significant reduction in the end-to-end rate for the service, compared to the total rates charged for the unbundled components used to assemble its existing offering. AT&T asserts that MCI already offers a comparable service based on alternative access, at a rate slightly below AT&T's proposed rate,[1] and approximately 20 percent below AT&T's rate for conventional service reliant on access from the local exchange carriers in these cities. Transmittal 1874 Description and Justification at 3-4. AT&T projects that demand for this service under its existing offering will decline approximately 25 percent in 1990 if it does not introduce this optional configuration. *Id.*

3. NYNEX contends in its petition that the FCA tariff unlawfully bundles rate elements, and prevents the customer from providing its own access, in violation of the Commission's private line rate structure guidelines, Sec. 61.40 of the Commission's Rules, 47 C.F.R. § 61.40. NYNEX Petition at 3-5.[2] Further, NYNEX asserts, the bundled offering discriminates against customers unable to obtain service from the AAVs used by AT&T in New York and Chicago, and against NYT. *Id.* at 5-6. Finally, NYNEX avers that any regulatory flexibility accorded AT&T to make such competitive responses must be accompanied by corresponding flexibility enabling the NYNEX companies to fashion corresponding, geographically specific or individual case offerings. *Id.* at 7-8.

4. AT&T replies that, contrary to NYNEX's mischaracterization, FCA actually expands the range of service options available to AT&T customers, and that end users in New York remain free to select NYT as their access provider. AT&T Reply at 3-4. AT&T also argues that FCA is not discriminatory because it is not comparable to AT&T's existing private line offering. In any event, FCA's lower rate is justified by the lower access costs incurred from the AAVs. Further, AT&T asserts, a reduced rate is not discriminatory if it both recovers costs and generates revenue that would not otherwise accrue to the carrier.[3] AT&T states that FCA will recover all costs and increase AT&T's net revenues for price cap services, thus benefiting rather than burdening AT&T's other customers. *Id.* at 5-6.

5. With respect to the private line guidelines, AT&T replies that they are regulatory review tools rather than "rigid, formal requirements" and that it has satisfied the Commission's cost support requirements. Moreover, AT&T states, FCA complies with the guidelines because the packaging of rate elements involved parallels the basic components provided under its other arrangements: interoffice channels, central office connections and local access available from AT&T, LECs or alternative suppliers. *Id.* at 6-7. AT&T distinguishes the Tariff 3 Order as addressing AT&T's "pre-divestiture private line tariff," and finding that a packaged offering and an unbundled offering used different rate structures containing disparate rate elements, while the FCA option uses as building blocks the same rate elements reflected in existing private line offerings. *Id.* at 7-8.

6. The Common Carrier Bureau has reviewed AT&T's Transmittal No. 1874, the petitioner's assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, suspend or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 9, Transmittal No. 1874, filed jointly by New England Telephone and Telegraph Company and New York Telephone Company as the NYNEX Telephone Companies, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The monthly rate for MCI's Financial Connection Digital Service is $620, and the corresponding rate for AT&T's FCA configuration is $650.

[2] In the Matter of Investigation of Access and Divestiture-Related Tariffs and AT&T Communications Private Line Services, FCC 84-292, February 14, 1985 (*Tariff 3 Order*).

[3] Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 85-540, Oct. 17, 1985.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 29, 1990

ACTION IN CC DOCKET NO. 87-313 COMMON CARRIER BUREAU SEEKS POST-DIVESTITURE PRODUCTIVITY DATA FOR LOCAL EXCHANGE CARRIERS

On January 26, 1990, the Chief, Common Carrier Bureau, requested that American Telephone and Telegraph Company (AT&T) and the United States Telephone Association (USTA) file data on local exchange carrier revenues, revenue requirements, exogenous costs, and demand for the period 1984 through 1989. The data collected in response to this request will be used to assist the Bureau in its preparation of the forthcoming Supplemental Notice in this docket. *See* FCC Announced "Price Caps" Schedule and Continues Interim Rate of Return (Press Release), Report No. DC-1532, released December 21, 1989 (statement of FCC Chairman Alfred C. Sikes, annnouncing that the Commission would consider a Supplemental Notice in the price cap docket in March, 1990).

Other interested parties are invited to submit data under the identical format required of AT&T and USTA. Data should be submitted no later than February 9, 1990. This public notice is intended to solicit data only. Parties interested in submitting pleadings or comments concerning productivity issues will have a full opportunity to comment subsequent to the release of the Supplemental Notice.

For further information, contact Chris Frentrup (202) 632-6312.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 1, 1990

CLARIFICATION OF PLEADING CYCLE FOR PETITIONS FOR RECONSIDERATION OF THE COMMISSION'S DECISION IN CC DOCKET No.88-136, LOCAL EXCHANGE CARRIERS' INDIVIDUAL CASE BASIS DS3 SERVICE OFFERINGS

On December 18, 1989, the Commission released an Order concluding that individual case basis (ICB) rates for DS3 and DS3 equivalent services are unlawful under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and directing local exchange carriers (LECs) to remove ICB rates, with limited exceptions, for DS3 and DS3 equivalent services from their tariffs. *See Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, CC Docket No. 88-136, FCC 89-339 (released Dec. 18, 1989) (*ICB Order*).

On January 18, 1989, petitions for partial reconsideration and clarification of the ICB Order were filed by Metropolitan Fiber Systems, Inc. (MFS) and Local Area Telecommunications, Inc. (Locate). These petitions were filed pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, which governs petitions for reconsideration of a final action in a Rule Making proceeding. Two other parties, Southwestern Bell Telephone Company and Williams Telecommunications Group, Inc., filed petitions for reconsideration of the *ICB Order*, on January 17 and January 18, 1990, respectively, pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. The pleading cycles established by Sections 1.429 and 1.106 for oppositions to petitions for reconsideration and replies to oppositions are different.

In light of the differences between Sections 1.429 and 1.106, this Notice serves to clarify that petitions for reconsideration in this proceeding are properly filed pursuant to Section 1.106. Therefore, the applicable deadlines for filing pleadings responding to petitions filed by MFS and Locate are those set forth in Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. Accordingly, oppositions to the MFS and Locate petitions are due 10 days from the release of this Public Notice and replies are due seven days thereafter.

For further information, contact Darrell Townsley, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
Tariff F.C.C. Nos. 1 and 2

Transmittal No. 1881

International Access to AT&T
800 Numbers Via USADirect Service

ORDER

Adopted: January 31, 1990; Released: February 2, 1990

By the Chief, Common Carrier Bureau:

1. On November 3, 1989, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1881 to introduce a new feature to its USADirect[1] calling card calling services. This new feature provides for international access to AT&T 800 Service, including AT&T 800 Domestic Service, AT&T Megacom 800 Service, and AT&T 800 ReadyLine (800 Service). Allnet Communications Services, Inc. (Allnet) filed a petition to reject or suspend and investigate this offering, and AT&T submitted a reply. Transmittal 1881 is scheduled to become effective February 3, 1990.

2. The service described in Transmittal 1881 will enable USADirect calling card customers to access AT&T 800 Service numbers from Mexico and other USADirect overseas locations. Through USADirect calling card calling, the customer will be connected to the desired AT&T 800 domestic number via the International Operating Center (IOC) located in Pittsburgh, Pennsylvania (NPA 412). AT&T Description and Justification at 1-2. Calling card customers will be able to reach all AT&T 800 Service customers that accept calls from NPA 412.

3. Calling card customers utilizing this service will be charged International Operator station rates for the USADirect portion of the call to AT&T's IOC if the call is ultimately completed to the desired 800 number. AT&T will bill 800 Service customers the rates currently in effect for calls that originate from NPA 412. *Id.* at 2. AT&T estimates that 3 percent of U.S. expatriates and U.S. military personnel located in Australia, France, West Germany, Italy, Japan, Korea, the Philippines, and the United Kingdom will place an average of four calls per year to AT&T's domestic 800 numbers. *Id.* at 3.

4. Allnet accuses AT&T of providing access from its USADirect Service only to AT&T 800 services and blocking access to the 800 services of other interexchange carriers. According to Allnet, the Commission found in the *TRAC Decision* [2] that blocking of access to alternative carriers conflicts with the *Competitive Carrier* decisions and with Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which requires carriers to file just and reasonable rates. Allnet also claims that AT&T's transmittal violates Section 201(a) of the Communications Act, 47 U.S.C. § 201(a). Allnet contends that Section 201(a) requires AT&T to establish physical connections with other carriers. Allnet Petition at 2-3. Allnet also argues that AT&T's transmittal is unreasonably discriminatory. According to Allnet, many other carriers provide 800 services to which USADirect calls can terminate. *Id.* at 3.

5. The AT&T reply states that AT&T is not deliberately blocking access to 800 services of other carriers. AT&T maintains that it has limited its offering to AT&T 800 numbers solely for technical reasons. AT&T states that its 800 database cannot translate 800 numbers of other carriers because the database contains only AT&T 800 Service numbers. It also disagrees with Allnet over the applicability of the *TRAC Decision*. AT&T Reply at 2.

6. AT&T explains that AT&T did not perceive significant demand for international access to domestic 800 numbers of other carriers prior to Allnet's present expression of interest to warrant the expense of extensive software changes to physical plant and the development of charges and billing mechanisms. However, in light of Allnet's apparent interest, AT&T states that it would be willing to explore technical solutions with Allnet and any other interested carriers. *Id. at 3.*

7. The Common Carrier Bureau has reviewed Transmittal 1881, the documentation supporting the transmittal, and the pleadings. We conclude that no compelling argument has been presented that AT&T's tariff revisions are so patently unlawful as to require rejection or that an investigation is warranted at this time. [3]

8. Accordingly, IT IS ORDERED that the petition to reject or, alternatively, suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. Nos. 1 and 2, Transmittal No. 1881, filed by Allnet Communications Services, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T USADirect service is a feature of AT&T international message telephone service (IMTS) operater handled calling which allows express collect and calling card calling from Mexico and overseas areas to the United States Mainland and Hawaii.

[2] Telecommunications Research and Action Center v. International Telecharge, Inc., 4 FCC Rcd 2157 (Com.Car.Bur. 1989) (*TRAC Decision*).

[3] We note that AT&T has expressed a willingness to explore technical solutions with Allnet to enable Allnet to take advantage of the international access feature introduced by Transmittal 1881. AT&T Reply at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies, Revisions to Tariff F.C.C. No. 4 — Transmittal No. 276

ORDER

Adopted: January 31, 1990; Released: January 31, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. BellSouth Telephone Companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), filed the above-captioned tariff revisions on October 23, 1989. The scheduled effective date is February 1, 1990. These revisions propose to revise jurisdictional reporting requirements and audit provisions to more clearly describe the methods and procedures for computing and reporting percentage interstate usage (PIU) for Feature Group A (FGA) and Feature Group B (FGB) Switched Access Services. US Sprint Communications Company Limited Partnership (Sprint) and Communications Services, Inc., and Metromedia Long Distance, Inc. (MLD/CSI) filed petitions to reject or suspend and investigate the tariff. BellSouth replied and filed minor revisions.[1]

II. BACKGROUND AND PLEADINGS

2. BellSouth proposes to revise its jurisdictional reporting requirements and audit provisions to more clearly describe the methods and procedures for computing and reporting PIU for FGA and FGB Switched Access Services. BellSouth is adding a formula for calculating PIU and specifying the types of records customers must maintain for auditing purposes and stating that such data be provided within 30 days of the company request.[2] Specifically, Section 2.3.10 (C) (1) of the proposed revisions provides that:

> The customer shall maintain and retain for a minimum of one year, complete, detailed and accurate records, workpapers and backup documentation in form and substance to evidence the percentage data provided to the Telephone Company as set forth in 2.3.10(A) preceding and shall make such information available during normal business hours, at the location named in the report, upon reasonable request by the Telephone Company in order to permit an audit by the Telephone Company auditor or outside auditor under contract to the Telephone Company or a mutually agreed upon outside auditor to be paid for by the customer, or an auditor of a regulatory commission. [3]

3. The tariff also requires a customer to state PIU for each local exchange carrier (LEC), to retain the records described above for one year, and to reimburse the telephone company for the cost of the audit if the customer is found to have overreported PIU by 5 percent or more.[4] BellSouth explains that because interstate and intrastate access rates are not identical, and because exchange carriers cannot identify the jurisdiction of FGA and FGB switched access usage, accurate PIU reporting is important.[5] BellSouth states that it began to conduct audits and found that intrastate usage was being understated and the manner of calculating PIU varied.[6] BellSouth says that it has conducted a series of meetings with state commissions and interexchange carriers, resulting in these tariff revisions which, it asserts, were agreed to by all.[7]

4. Sprint agrees to implement the new PIU formula, but takes issue with the audit and reporting requirements. It argues that these provisions will require access to proprietary information, will not increase the accuracy of the PIU significantly, and will impose high costs on the interexchange carriers (ICs).[8] Sprint says that implementation of LEC-specific reporting would require 1600 hours of programming time, which is unwarranted in view of the very small percentage of FGA and FGB traffic presently carried.[9] Sprint also alleges that to comply with the record retention requirements it would have to modify its entire records management, reporting, and audit systems and incur an estimated cost of $45-50,000 per year for storage of magnetic tapes or $140,000 per year for storage of disks in addition to administration and other costs.[10] Sprint says that this revision violates the Commission's policy of avoiding undue burdens on the ICs and unnecessary intrusion into their private records.[11]

5. MLD/CSI also state that they do not object to the new PIU formula. However, they argue that they should be able to continue to report their PIU on a statewide basis.[12] They also maintain that BellSouth has failed to prove any significant divergence of actual PIUs from reported PIUs, and that therefore BellSouth has not justified the new record retention requirements. They argue that 12 months is too long for the retention period, and that the new penalties are too broad, because the telephone company auditors have too much discretion in calculating the audited PIU. While MLD/CSI retain some data for a year, some of the data required by these revisions are retained for much shorter periods. MLD/CSI posit that if BellSouth is merely worried about data manipulation, the data retention requirement could be limited to a relatively short period, such as three months, with the timing of the BellSouth audit being established on a random basis, with a continued limitation to a frequency of not less than annually.[13]

6. BellSouth replies that the change to LEC specific PIU reporting expands the level at which customers are permitted to report the PIU to statewide and LATAwide. The LEC specific language was added to assure that the reported PIU would exclude services BellSouth has no part in providing. BellSouth argues that this is reasonable.[14] The carrier further states that the one year record retention requirement merely places a limitation on the time for which customers must retain information supporting the PIU. The tariff at present contains no time limit.[15]

7. As to the type of information that must be kept, BellSouth says that the tariff merely describes the type of information needed to develop the PIU in the first place.

The specific information to be kept by the customer is that which is mutually agreed upon with BellSouth. If no agreement can be reached, the appropriate regulatory body will be consulted.[16] Finally, BellSouth states the reimbursement provisions for the cost of the audit are designed to avoid burdening ratepayers and to provide a deterrent to misreporting. BellSouth says that if the results of the audit are disputed, the dispute resolution provisions of the tariff apply.[17] BellSouth also filed minor revisions to its original proposal.

III. DISCUSSION

8. The record retention requirements proposed by BellSouth include language essentially identical to that rejected in CC Docket No. 83-1145 as unduly intrusive. The language rejected in the original National Exchange Carrier Association (NECA) tariff read:

> The IC shall maintain and retain for a minimum of one year, complete, detailed and accurate records, workpapers and backup documentation in form and substance to evidence the percentage data provided to the telephone company as set forth in (A)(1) and (2) preceding. All of the records, workpapers and backup documentation shall be made available during normal business hours, at the location named in the report, upon reasonable request by the telephone company in order to permit a review by the telephone company auditor or outside auditor under contract to the telephone company or an auditor of a federal or state regulatory commission.[18]

The Commission said with respect to this language, "We are also particularly troubled by the intrusiveness of the accompanying provisions in Section 2.3.14(B), whereby the ICs would be required to maintain documentation of their jurisdictional reports for auditing by the telcos 'upon reasonable request.'"[19]

9. The Commission has continued to guard against unduly intrusive PIU reporting requirements. In its 1985 Order dealing with entry/exit surrogates (EES),[20] the Commission reiterated the concern that verification requirements not be unduly burdensome or intrusive or be discriminatorily applied. It allowed LECs to require that IC customers keep records of call detail from which PIU can be ascertained and make the records available for inspection as reasonably necessary for verification. However, the Commission emphasized that any verification requirements could not impose an undue financial burden on smaller ICs that may not keep extensive records. The right to audit was also limited to specific intervals of substantial duration, rather than that it be qualified merely by a requirement that reasonable prior request be made.

10. Finally, in the *1989 EES Order*,[21] the Commission refused to establish uniform, nationwide procedures for verification of interstate and intrastate usage of FGA and FGB services, but adopted certain basic guidelines. It adopted the guidelines set forth in the *1985 EES Order*, but limited verification audits to no more than one per year, except in extreme circumstances. Furthermore, it required that audits be conducted by independent auditors if the LEC and the IC or the IC alone is willing to pay the expense.

11. While BellSouth has incorporated this last requirement, regarding independent auditors, it has otherwise failed to meet the Commission's guidelines. The list of records that must be retained and produced "upon reasonable request" is long and burdensome, and allows BellSouth to agree discriminatorily to negotiate with some carriers for reduced retention requirements. Moreover, the audits are not limited to one per year, nor are they to occur at specific intervals of substantial duration. Thus, Section 2.3.10 (C) of the revisions does not comply with the Commission's requirements as established in the *1989 EES Order*, and as such, it is unreasonable under Section 201(b) and must be rejected as patently unlawful.

12. Based upon our review of the record, however, we find that no compelling argument has been presented that the remainder of the tariff revisions are patently unlawful so as to require rejection and that an investigation of the remaining revisions is not warranted at this time.

IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons stated above, we conclude that the tariff revisions in Section 2.3.10(C) of Transmittal Nos. 276 and 286 are patently unlawful because those provisions violate established Commission precedent and Section 201(b) of the Communications Act, 47 U.S.C. §201(b). We therefore reject the proposed Section 2.3.10(C).

14. Accordingly, IT IS ORDERED that pursuant to Section 201(b) of the Communications Act, 47 U.S.C. §201(b), Section 2.3.10(C) of BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal Nos. 276 and 286 IS REJECTED.

15. IT IS FURTHER ORDERED that the petitions against BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal Nos. 276 filed by the above-listed petitioners ARE GRANTED IN PART and otherwise ARE DENIED.

16. IT IS FURTHER ORDERED that BellSouth Telephone Companies SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

17. IT IS FURTHER ORDERED that Special Permission No. 90-121 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§61.58, 61.59, are waived for the purposes of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] BellSouth Tr. No. 286, filed Jan. 12, 1990.

[2] BellSouth Description and Justification (D&J) at 1.

[3] BellSouth Tr. No. 286 at Section 2.3.10(C)(1).

[4] D&J at 4.

[5] *Id.* at 1-2.

[6] *Id.* at 2-3.

[7] *Id.* at 3-4.

[8] Sprint Petition at 3.

[9] *Id.* at 6.

[10] *Id.* at 8.

[11] *Id.* at 9-10.

[12] MLD/CSI Petition at 2.

[13] *Id.* at 4-5.

[14] BellSouth Reply at 3.

[15] *Id.* at 4.

[16] *Id.* at 5.

[17] *Id.* at 6-7.

[18] *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1166 (1984).

[19] *Id.*

[20] MCI Telecommunications Corporation, FCC 85-145, rel. Apr. 16, 1985 (*1985 EES Order*).

[21] Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, 4 FCC Rcd 8448 (1989) (*1989 EES Order*), adopting Joint Board Recommended Decision and Order, 4 FCC Rcd 1966 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase I

In the Matter of

Investigation of
Special Access Tariffs of
Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1990; Released: February 1, 1990

By the Chief, Common Carrier Bureau:

1. On January 24, 1986, the Commission released an Order addressing various issues in an investigation of special access tariffs of local exchange carriers (LECs).[1] Among the issues included in the investigation was whether charges made by Bell Operating Companies (BOCs) to the American Telephone and Telegraph Company (AT&T) pursuant to Shared Network Facilities Agreements (SNFAs) constituted unreasonable discrimination vis-a-vis special access rates, in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

2. The Commission's Order was remanded by the Court of Appeals for further consideration. *MCI v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). The Common Carrier Bureau (Bureau) established a pleading cycle to assess further the issues in this investigation as directed by the Court of Appeals. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, 4 FCC Rcd 687 (Com.Car.Bur. 1989)(*January Order*). The *January Order* set a deadline of June 13, 1989, for supplemental direct cases. *Id.* at 688. The deadlines in the *January Order* were later extended to November 13, 1989, for oppositions to the supplemental direct cases, and December 13, 1989, for replies to the oppositions. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, 4 FCC Rcd 6837 (Com.Car.Bur. 1989)(*September Order*). MCI Telecommunications Corporation (MCI) was among the parties that filed oppositions on November 13, 1989, in compliance with the schedule established in the *September Order*.

3. On January 12, 1990, 30 days after the close of this pleading cycle, MCI filed a motion for leave to file supplemental pleading and, concurrently, a pleading styled as a reply to BOC and AT&T rebuttals. This Reply includes arguments continuing the debate on the issues raised by the Court and the *January Order*, and revisions to the rate comparisons MCI submitted in its Opposition. MCI's Motion was opposed by the New England Telephone and Telegraph Company and the New York Telephone Company (together, NYNEX), Southwestern Bell Telephone Company, and the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (together, US West).

4. Section 1.45(c) of the Commission's Rules, 47 C.F.R. § 1.45(c), prohibits the filing of additional pleadings unless specifically authorized or requested by the Commission. We believe the pleading cycle as established and modified provided a fair opportunity for all parties to present evidence and discuss the issues in this proceeding. We find no good cause to add additional cycles for any of the parties at this time. However, in the interest of an accurate factual record, we will accept MCI's revisions of its data comparing special access rates and SNFA charges, as errata to MCI's opposition.

5. Accordingly, IT IS ORDERED that the motion for leave to file supplemental pleading filed by MCI Telecommunications Corporation, IS DENIED and the reply to the Bell Operating Companies' and American Telephone and Telegraph Company's rebuttals IS DISMISSED, except to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52 (released Jan. 24, 1986)(*1986 SNFA Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-411

Amendment of Sections of Part 22
of the Commission's Rules in the
Matter of Airborne use of
Cellular Units and the Use of
Cell Enhancers in the Domestic
Public Cellular Radio Service

ORDER

Adopted: February 1, 1990; Released: February 2, 1990

By the Chief, Common Carrier Bureau:

1. On January 22, 1990, the Air Transport Association of America (ATA), on behalf of its member airlines, requested an extension of time to March 5, 1990, in which to file reply comments in response to a Federal Aviation Administration (FAA) letter concerning the above-referenced proceeding.

2. ATA states that several of its member airlines have indicated they are unable to submit reply comments by the February 2, 1990 reply date because of the limited period for response and the business travel schedules of technically qualified staff members. ATA further states that, given the technical complexity of this proceeding and the potential safety implications to the over one million passengers carried daily by ATA's members, it believes that the public interest would best be served by extending the due date for filing reply comments.

3. Accordingly, good cause having been shown, the extension of time requested by ATA will be granted. In order to promote administrative efficiency, a common response date for all parties will be established. Therefore, the due date for filing reply comments IS EXTENDED to **March 5, 1990.**

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-10

In re Applications of

Wayne G. Mulligan, Richard D. Buckley, Jr., & Richard S. Korsen d/b/a RANCHO MIRAGE RADIO, A GENERAL PARTNERSHIP (hereafter "RMR")	File No. BPH-870331MZ
HUGH R. PAUL (hereafter "Paul")	File No. BPH-870331PN
SUNDIAL RADIO BROADCASTERS, A CALIFORNIA LIMITED PARTNERSHIP (hereafter "Sundial")	File No. BPH-870421MC
DANIEL P. MITCHELL (hereafter "Mitchell")	File No. BPH-870422MB
Jess Drake and Isabelle Drake d/b/a DRAKE BROADCASTING (hereafter "Drake")	File No. BPH-870422ME
ANNE K. WALLACE AND WILLIAM F. WALLACE (hereafter "Wallace")	File No. BPH-870422MJ
DESERT SUN RADIO, LTD. (hereafter "Desert Sun")	File No. BPH-870422ML
VALERIE WINTERS (hereafter "Winters")	File No. BPH-870327MD (PREVIOUSLY DISMISSED)
PIKE FAMILY BROADCASTING, INC. (hereafter "Pike")	File No. BPH-870330MT (PREVIOUSLY DISMISSED)
G. DALE COWLE (hereafter "Cowle")	File No. BPH-870422MG (DISMISSED HEREIN)

For Construction Permit
for a New FM Station
in Rancho Mirage, California
on Channel 258A (99.5 MHz)

HEARING DESIGNATION ORDER

Adopted: January 9, 1990; Released: February 7, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On May 9, 1987, the FM Branch returned as unacceptable for filing several applications, including those filed by Winters and Pike for proposing facilities in excess of those allowed for a Class A Station under the United States/ Mexico Working Agreement of 1972. On June 3, 1988, the FM Branch reinstated Cowle's application, indicating that its May 8, 1988 return "was in error because it failed to consider the April 20, 1988 amendment which corrected the deficiency" resulting in Cowle's tendered proposal violating the U.S.-Mexican Agreement. *Letter to G. Dale Cowle from Dennis Williams, Chief, FM Branch,* (dated June 3, 1988).[1]

3. Winters, Pike and Desert Sun have petitioned for reconsideration of the Branch's actions. While Winters has simply requested reconsideration of this action, Pike's pleading alleged that its application "complied with each and every requirement of the Commission's Rules and Regulations." *Petition,* at paragraph 1. Specifically, Pike argued that "[n]owhere do the rules set forth any other or additional requirements for protection to Mexican stations" beyond those set forth in 47 C.F.R. § 73.207(b)(3). Petition, at paragraph 2. Further, Pike alleges that the December, 1985 Public Notice noted in the Branch's return letter "imposed a substantive requirement, which was required to be published [in the *Federal Register*] but was not." *Petition,* at paragraph 5. Along with their petitions for reconsideration, Winters and Pike tendered amendments reducing their respective effective radiated powers to comply with the Mexican Agreement.

4. Desert Sun's petition for reconsideration alleges that "regardless of the correctness of Cowle's initial terrain analysis, Cowle was forbidden by the Treaty from proposing an HAAT of 100 meters at 3 kilowatts *under any circumstances." Petition,* at paragraph 3. Cowle's opposition argues that his "actual proposal has always complied with the terms of the agreement." *Opposition,* at paragraph 7. Further, Cowle claims that "[t]he Commission has a well-established policy of accepting an application for filing even though an error or inconsistency is found" since it "will use the information contained in an application in conjunction with its own engineering analysis" to derive the correct response." *Opposition,* at paragraph 10. Finally, Cowle states that "[i]f there is a discrepancy between what the applicant specifies and what is in the Commission records, the applicant will be instructed to file an amendment to make its proposal consistent with the Commission's records." *Opposition,* at paragraph 3. Had he "not amended on his own," Cowle concludes "that he would have been instructed [by the Commission] to do so." *Opposition,* at paragraph 14.

5. We reject the arguments offered in Pike's petition and Cowle's opposition. The Commission's established policy holds applicants responsible for compliance with our rules and [rejects] all efforts to shift responsibility to others." *United Public Broadcasting Co., Inc.*, 57 RR 2d 1605, 1606 (1985). The technical requirements governing Class A stations within 320 kilometers (199 miles) of the U.S.-Mexican border are clearly-defined and consistent: they indicate that international agreements may restrict the use of some channels, which agreements are relevant and where they may be purchased or inspected. *See* 47 C.F.R. §§ 73.204 and 73.1650. Further, explicit notice of the applicability of the U.S.-Mexican Agreement was published in the *Federal Register* four years prior to the filing of the first application in this proceeding, cautioning applicants within the affected areas that Class A facilities must conform to the maximum facilities set forth in the Agreement. *Report and Order* in BC Docket 80-90, 48 Fed. Reg. 29486, 29499 (1983). A similar caution that "[i]nternational agreements also influence permissible ERP levels in border areas" appeared nearly two years prior to the filing of the first Rancho Mirage applications. *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (1985) (Appendix D). The fact that applicants may have had no actual knowledge of the agreement does not excuse noncompliance. *See, e.g., Kerrville Radio*, 2 FCC Rcd 3441, 3442 (1987); *Stearns County Broadcasting*, 104 FCC 2d 688, 696 (Rev. Bd. 1986). It was therefore incumbent on the applicants here to review all pertinent requirements before filing to ensure compliance. *Kerrville*, at paragraph 6.

6. We also disagree that Winters and Pike should now be permitted to amend their applications to comply with the Mexican agreement, and that Cowle's April 20, 1988 amendment was filed pursuant 47 C.F.R. § 1.65's requirement that applicants "furnish additional or corrected information as may be appropriate." Under the new "window" processing rules adopted in MM Docket 84-750, applicants are provided a 30-day period, running from the release of a *Public Notice* announcing the tenderability of an application, to perfect their applications for filing. Afterward, the filing of amendments is severly constrained. *Docket 84-750*, at 19941, and 47 C.F.R. § 73.3522(a)(6). In this case, the *Public Notice* was released on May 28, 1987. *See Broadcast Applications*, Report No. 13930, page 8. Cowle tendered his amendment reducing his HAAT to 77 meters on April 20, 1988; Winters tendered her amendment on June 29, 1988; and Pike tendered its amendment on June 1, 1988. All were tendered well beyond the amendment as of right period. Since adequate notice was provided for both the FM processing standards and the power/height limits imposed by the Mexican Agreement, neither Winters, Pike nor Cowle have provided grounds warranting deviation from the Commission's processing standards.[2] Accordingly, Winters and Pike's petitions for reconsideration will be denied, Desert Sun's petition for reconsideration will be granted and Cowle's application will be dismissed as inadvertently accepted for filing.

7. *Sundial.* Our engineering study reveals that Sundial has plotted erroneous values to the 3.16 and 1 mV/m contours at the 45, 90, 180, 225 and 270-degree radials. The difference between the values calculated in Section V-B, Item 19 and those plotted in the contour map is approximately 40-55 percent. This deficiency does adversely affect the applicant's city coverage. Accordingly, Sundial is required to provide a corrected contour map and new area and population data to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. Sundial's engineering statement indicates that its proposal "would provide coverage for approximately 76.5 percent of the population within the Rancho Mirage City Limits and 60 percent of its area." Accordingly, it has requested waiver of 47 C.F.R. § 73.315. [3] Since Sundial has provided no justification in support of its request, an issue will be specified.

9. *Environmental.* Paul, Wallace and Desert Sun propose to construct their transmitting antennas near other broadcast facilities. Our engineering study indicates that these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Paul, Wallace and Desert Sun's proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. These studies must include the cumulative effect of the proposed operations and any collocated or nearby RF sources. If a fence is to be built, the applicants must give the distance from the base of the tower to the fence. Accordingly, Paul, Wallace and Desert Sun will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

10. *Late - filed Amendments.* RMR (on January 7, 1988), Drake (on September 8, 1988), Wallace (on June 16, 1988) and Desert Sun (on October 11, 1989) petitioned for leave to amend their applications. The accompanying amendments were filed after June 29, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

11. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and

populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sundial's proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. If a final environmental impact statement is issued with respect to Paul, Wallace and/or Desert Sun in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by Winters and Pike ARE DENIED, the petition for reconsideration filed by Desert Sun IS GRANTED, and the application filed by Cowle IS HEREBY DISMISSED as inadvertently accepted for filing.

15. IT IS FURTHER ORDERED, That Sundial must file, within thirty days of the release of this Order, an amended contour map and new area and populations data with the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, Paul, Wallace and Desert Sun shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

17. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RMR, Drake, Wallace and Desert Sun ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The Branch's letter noted that Cowle relied on incorrect terrain data contained in FM Station KPLM's construction permit application (File No. BMPH-820302AK) "to compute the [HAAT] along the required radials," and that, given the apparent corrective intent of Cowle's April 20, 1988 amendment, good cause existed for acceptance of his amendment and reinstatement of his application.

[2] While in the guise of a *corrective* amendment, Cowle's April 20, 1988 amendment is, in fact, *curative* and therefore not acceptable. *See Primemedia Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988). Further, a careful reading of the cases cited in his Opposition reveals that none of the deficiencies involved therein affected the acceptability of the concerned applications. In stark contrast, Cowle's tendered application specified the prohibited 100-meter HAAT in at least twelve portions of his application with no apparent cognizance of the mandates of the U.S.-Mexican Agreement. Finally, acceptance of Cowle's implication that the staff is responsible for discovering the "actual" facilities behind every patently defective proposal is contrary to the Commission's finding that temporizing with flawed proposals "disserves the public interest by inordinately delaying the institution of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n.7 (1985); *Star Signal Corporation*, 1 FCC Rcd 405, 406 (1986).

[3] The FM Branch does not require waiver of this requirement unless the 3.16 mV/m coverage falls below 80% of the residential area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also, Southwest Communications, Inc.*, released July 16, 1986 *(Letter from the Chief, FM Branch*, reference 8920-HVT).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-2

In re Applications of

VAN BUREN BROADCASTING (hereafter "Van Buren")	File No. BPH-880125MK
SPENCER BROADCASTING GROUP (hereafter "Spencer B")	File No. BPH-880126MZ
SPENCER COMMUNICATIONS, LTD (hereafter "Spencer C")	File No. BPH-880126NB
JOHNNY LEYFETTE ASHLEY (hereafter "Ashley")	File No. BPH-880126NR
HUGH L. HALE AND TOMMY MILLER (hereafter "Hale and Miller")	File No. BPH-880126NW

For Construction Permit
for a New FM Station on Channel 254A
in Spencer, Tennessee

HEARING DESIGNATION ORDER

Adopted: January 9, 1990; Released: February 7, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Van Buren.* An engineering study reveals that applicant Van Buren is in violation of 47 C.F.R. § 73.211. The proposed effective radiated power (ERP) and antenna height above average terrain (HAAT) of 1.2 kilowatts and 167 meters exceeds the maximum ERP/HAAT combination allowed for Class A facilities (3 kw/100 m). The ERP/HAAT proposed in the application produces a distance to the 60 dbu contour of 24.7 kilometers while the distance to the 60 dbu contour for a maximum Class A facility is 24 kilometers (rounded to the nearest kilometer). In order for the proposal to comply with 47 C.F.R. § 73.211 the ERP would have to be reduced to 1.1 kilowatts. In this case, the discrepancy is not a tenderability nor is it an acceptability defect insofar as the minimal nature of the defect appears attributable to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under the rules. Therefore, the discrepancy may be resolved by an amendment.

3. *Hale and Miller.* An engineering study reveals that Hale and Miller's application incorrectly calculated the antenna height above average terrain (HAAT). Using the applicant's eight radial values for height of radiation center above average terrain, our study determined the HAAT to be 172 meters after rounding. The applicant indicated an HAAT value of 171 meters in Item 7(b)(3) of Section V-B of the application. Using the corrected data, the engineering study reveals that the applicant is in violation of 47 C.F.R. § 73.211. The effective radiated power (ERP) and antenna height above average terrain (HAAT) of 1.1 kilowatts and 172 meters exceeds the maximum ERP/HAAT combination allowed for Class A facilities (3 kW/100m). The ERP/HAAT determined from the application produces a distance to the 60 dbu contour of 24.6 kilometers while the distance to the 60 dbu contour for a maximum Class A facility is 24 kilometers (rounded to the nearest kilometer). In order for the proposal to comply with 47 C.F.R. § 73.211 the ERP would have to be reduced to 1.0 kilowatts. In this case, the discrepancy is not a tenderability nor is it an acceptability defect insofar as the minimal nature of the defect appears attributable to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under the rules. Therefore, the discrepancy may be resolved by an amendment.

4. *Spencer B.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Spencer B has not completed Item 4 correctly. Spencer B's application gives a post office box number as the residence address for one of its principals, John B. Hunter, Jr. Accordingly, Spencer B must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. As originally filed on January 26, 1988, the Spencer B application contained a "NO" check to the financial qualifications question, indicating that sufficient funds were not available from committed sources to construct and operate the requested facilities for three months. Spencer B stated that its certification would be filed within 30 days as an amendment to the application. To date, Spencer B has failed to file the stated amendment. Therefore, a financial qualifications as well as a misrepresentation issue will be specified below.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Spencer B and Hale and Miller have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Spencer B and Hale & Miller would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. The Spencer applications being considered in this proceeding conflict with a pending Rule Making filed on September 15, 1988 by WHUB, Inc., licensee of station WHUB-FM, Cookeville, TN to, *inter alia*, modify the frequency of the Spencer application from Channel 254A to Channel 297A.[1] At the time that the Spencer applications were filed, a petition for Rule Making had not yet been

filed. Accordingly, we will designate these applications for hearing on Channel 254A. However, the construction permit issued to any of these applicants will be conditioned upon the outcome of the WHUB-FM, Cookeville, TN Rule Making proceeding. Consequently, the September 15, 1988 informal objection and February 21, 1989 supplement filed by WHUB, Inc., licensee of station WHUB-FM, in this regard, will be granted to the extent indicated herein.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Spencer B is financially qualified to be a Commission licensee.

2. To determine whether Spencer B misrepresented the facts to the Commission on January 26, 1988, when it represented that it would file an amendment relating to its financial "certification within 30 days," and, if so, what effect that has on Spencer B's qualifications to be a Commission licensee.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by the Spencer B and Hale and Miller applications would constitute a hazard to air navigation.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That Van Buren will be required to file within 30 days of the release of this Order an amendment correcting the engineering discrepancy detailed in paragraph 2 with the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That Hale and Miller will be required to file within 30 days of the release of this Order an amendment correcting the engineering discrepancy detailed in paragraph 3 with the presiding Administrative Law Judge.

13. IT IS FURTHER ORDERED, That Spencer B shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That the ultimate construction permit issued in the Spencer, Tennessee proceeding will be conditioned upon whatever action is taken in the WHUB-FM, Cookeville, TN Rule Making proceeding.

16. IT IS FURTHER ORDERED, That the informal objections filed by WHUB, Inc. are granted to the extent indicated herein.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We note that the currently proposed facility for WHUB-FM on Channel 253C2 is short-spaced to the proposed Channel 254A allotment for Spencer.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 2, 1990

Pleading Cycle Established on Metropolitan Fiber Systems' Petition on Interconnection of Competitive Carrier Access Facilities RM 7249

Metropolitan Fiber Systems, Inc. (MFS), an alternative access provider, has filed a petition for Rule Making requesting that the FCC establish rules under Section 201(a) of the Communications Act governing "the physical interconnection of facilities for competitive carriers providing local access services" in the interstate market.

MFS argues that effective competition within the local exchange requires that each separable component of the exchange access network be priced on an unbundled, cost-supported basis, and that competing access service providers be able to connect to the BOC networks at reasonable interface points.

MFS specifically requests that the Commission issue a statement mandating interconnection of competing local access carriers, and requiring that the BOCs make access to their networks available on reasonable and non-discriminatory terms. MFS also asks the Commission to adopt specific procedures under which a carrier could obtain physical access to the network of a competing carrier if the two parties were unable to reach an agreement.

MFS asserts that requiring non-discriminatory access to bottleneck facilities will enhance the efficiency and reliability of local access networks, diminish incentives for construction of duplicative facilities, and reduce private bypass. MFS also argues that the Commission can require interconnection for interstate access without preempting state regulation of intrastate services.

Interested parties may file comments on this petition with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554, by **April 4, 1990,** and reply comments by **May 14, 1990.** Two copies should also be sent to Melissa Newman, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public records duplication: International Transcription Services, Inc. (ITS), Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Copies of MFS's petition may be obtained from ITS at (202) 857-3800, or by contacting Carolyn Freeman, Room 544, FCC, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Melissa Newman, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-9342.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TULSA 23 File No. BALCT-890310KF
(Assignor)

and

CLEAR CHANNEL TELEVISION, INC.
(Assignee)

For Assignment of License of
Station KOKI-TV, Tulsa, Oklahoma

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1989; Released: February 7, 1990

By the Commission:

1. The Commission has before it for consideration the above-captioned application for consent to assignment of license of station KOKI-TV, channel 23 (IND), Tulsa, Oklahoma, from Tulsa 23 to Clear Channel Television, Inc. (Clear Channel), a subsidiary of Clear Channel Communications, Inc., the licensee of stations KAKC(AM) and KMOD-FM, Tulsa, Oklahoma. Clear Channel has requested a permanent waiver of Section 73.3555(b), the Commission's "one-to-a-market" rule, which generally prohibits common ownership of a television station and aural stations in the same market.[1]

2. On February 23, 1989, the Commission released its *Second Report and Order* in MM Docket No. 87-7 (*Second Report and Order*), 4 FCC Rcd 1741 (1989), in which it retained the one-to-a-market rule, but adopted a revised waiver standard for cases satisfying certain criteria. Specifically, the Commission indicated that it would "look favorably upon waiver applications involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees or 'voices' after the proposed merger." *Id.* at 1741. The Commission also stated that it would look with similar favor on waiver requests involving "failed" broadcast stations. Beyond these two circumstances, the *Second Report and Order* asserted that waiver applications would be considered on a case-by-case basis and evaluated using five public interest criteria: (1) the potential benefits of joint operation of the facilities; (2) the types of facilities involved (*e.g.*, VHF or UHF, AM or FM); (3) the number of media outlets already owned by the applicant in the relevant market; (4) any financial difficulties experienced by the stations involved; and (5) the nature of the market -- that is, the level of competition and diversity, based on both broadcast and other media voices, after the requested joint operation is implemented. These factors would be weighed to determine whether, in a given case, the potential benefits of combined facilities can be obtained without undermining the public interest in diversity and economic competition in communications markets.

3. In support of its waiver request, Clear Channel first argues that its waiver request should be viewed by the Commission under the "failed" station standard because the circumstances surrounding KOKI-TV are closely akin to that of a failed station. In this connection, it claims that the only meaningful distinction between the instant situation and that of a "failed" station is that the current owners of KOKI-TV have been willing to finance the station's continued unprofitable operations out of their own pockets, whereas the owners of a failed station are presumably either unwilling or unable to subsidize continued operation. Since commencing operation in 1981, Clear Channel maintains, KOKI-TV has never been profitable, although for several years the station did experience positive net operating income, and became the fourth-ranked station in the market. Mr. Lavenstein, the KOKI-TV general manager, explains in his affidavit that the net overall loss in large part is due to substantial debt service obligations on the term of the loans. Accordingly, the station has operated at a net overall loss as set forth below:

Year	Revenues (less commissions)	Expenses	Income
1982	$2,855,597	$4,707,394	($1,851,797)
1983	4,004,710	4,724,645	(719,935)
1984	4,399,424	4,504,608	(105,184)
1985	4,689,061	4,816,793	(127,732)
1986	4,558,138	4,741,916	(183,778)
1987	3,956,502	4,774,410	(817,908)
1988	3,511,704	4,909,584	($1,397,880)

Year	Depreciation & Amortization	Cash Flow
1982	$359,134	($1,492,663)
1983	344,601	(375,334)
1984	316,439	211,255
1985	321,239	193,507
1986	336,596	152,818
1987	304,842	(513,066)
1988	250,156	(1,147,724)

For 1989, Clear Channel asserts that the station projects a net operating loss of approximately $280,000. Clear Channel also anticipates that additional payments totaling $1,200,000 will have to be contributed by the limited partners during the remainder of 1989, primarily to service the station's debt. Moreover, Clear Channel maintains that KOKI-TV has only been able to continue operation because of cash contributions from the owners. It states that cash contributions by the limited partners during the start-up (1981-1982) of the station's operations totaled $4,000,000, and that since December 1987, the limited partners have been required to contribute additional capital contributions totaling $1,982,000 to service the debt obligations on term loans.

4. Clear Channel further argues that, even if the instant waiver request were to be judged by the five criteria set forth in paragraphs 90 through 97 in the *Second Report and Order*, a grant of its request is warranted. Concerning the first factor, which deals with public service benefits such as the economies of scale and efficiencies of opera-

tion, cost savings, and programming and service benefits, Clear Channel states that its acquisition of KOKI-TV in conjunction with its ownership of KAKC(AM) and KMOD-FM, Tulsa, Oklahoma, will permit significant economies of scale to be achieved. It points out that among the important economies of scale which will result from the subject acquisition are savings associated with the prospective common location of the stations' studio facilities, the sharing of personnel (including receptionist, accounting, billing, news and engineering employees), and the joint participation of the stations in certain programming production activities. It projects that these economies of scale will reduce the total current operating costs of the stations by approximately 10%.[2] Moreover, Clear Channel avers that its substantial economic resources and broadcast experience, together with the profitability of its AM and FM stations will provide the finance, expertise and guidance necessary to make KOKI-TV a viable operation. Further, Clear Channel maintains that the economies of scale will permit it to repair, replace and upgrade KOKI-TV's equipment and facilities; and to improve and expand the station's local news, public affairs, and other public interest programming. In that regard, it states that it plans to shift the station's focus from national to local news, increase the full-time news staff, purchase electronic news gathering equipment, and to subscribe to a 24-hour satellite weather information service. Additionally, it proposes to air a 30-minute locally produced public affairs program (community forum format) at 10 p.m. each Sunday, which will be hosted on alternate Sundays by a group of four or five local minority and other community leaders. Moreover, Clear Channel proposes to expand and enhance the station's children programming by producing a locally hosted "Kids Club" program, and a "Teen News" segment. It points out that the "Teen News" segment will feature information geared toward the problems and concerns directly affecting teenagers. The proposed radio and television combination, Clear Channel maintains, will also permit an increase in public service programming on the AM and FM stations.

5. With respect to the types of facilities involved, the second factor to be considered, Clear Channel notes that KAKC(AM) (1300 kHz, 5 kW-D, 1 kW-N, DA-2) is a directional Class III facility with reduced power at night; that KMOD-FM (97.5 mHz; 100 kW antenna 1,800 feet) is a Class C facility, the class with the highest power available for an FM station; and that KOKI-TV (Channel 23, 3310 kW visual ERP; HAAT, 1310 feet) is an independent UHF station, broadcasting 5 hours of Fox programming weekly. Despite the nature of the facilities, Clear Channel points out that they are not the most dominant facilities in the market, *i.e.* a clear channel AM station or a VHF television station. Further, since Clear Channel has no other media interests in the market, except those under consideration here, the third factor, the number of media outlets owned by the applicant in the relevant market, should not, according to Clear Channel, be an impediment to its request for waiver.

6. With regard to the fourth factor, which is concerned with the financial difficulties of the station in question, Clear Channel asserts that KOKI-TV has been operating at a net loss since its inception and that the owners have had to invest increasing amounts of their personal resources to keep the station on the air. It claims that the station's financial difficulties can be attributed to a general downturn in the economy of the Tulsa area, especially the oil industry. Clear Channel points out that during the past few years, each of the three major oil companies in Tulsa reduced its Tulsa area operations in ways that resulted in the loss of approximately 60,000 jobs in the region. During this same period, it states that Tulsa dropped from the 52nd to the 54th ADI television market, and that local advertisers significantly curtailed their television advertising budgets in view of the decreased consumer demand. Also during this period, Clear Channel avers that other national advertisers curtailed their program sponsorship. In light of these declines and in order to retain their share of the market advertising revenues, Clear Channel claims that a number of stations in the market instituted a rate war, which still continues. It estimates that overall market advertising revenues declined from $46 million in 1982 to $36 million in 1988. It notes that station KGCT-TV (IND), Channel 41, Tulsa, Oklahoma, has gone off the air because of financial difficulties and has been offered for sale for some time.[3] Clear Channel claims that, because of the decline in market advertising, KOKI-TV has been forced to cut its personnel (from a high of 50 persons to 42 persons), annual promotion expenditures (from $200,000 to $50,000), programming costs (from a high of $1.3 million to $0.8 million per year) and has had to reduce substantially its news programming from 7 to 5 days per week. It notes that the news programming has been limited to one-minute news segments broadcast throughout the day because the station cannot afford to produce a daily local news program in competition with the VHF network affiliated stations in the market.

7. Clear Channel also asserts that the owners of KOKI-TV have been attempting to sell the station for approximately two years, without success. During this period, Clear Channel maintains that the station has been marketed by several broadcast brokers, and that the owners have lowered the asking price by several million dollars in an effort to attract potential buyers, ultimately reducing it to slightly over $6 million. A declaration from the general manager of KOKI-TV, states that the contract price will not reimburse the station's investors for all of the expenditures which they already have made in connection with the station. Although the station has been marketed by several brokers and the asking price has been repeatedly lowered, Clear Channel observes that it is the only entity which has made an offer to purchase the station. Clear Channel claims that, absent a grant of the subject application, Tulsa 23 will be forced either to continue to subsidize the station's operating losses through further capital contributions from its owners, which they no longer wish to make, or to take the station off the air.

8. The fifth and final factor in our case-by-case review is concerned with the nature of the relevant market in light of our traditional diversity and competition concerns. This includes the number of broadcast outlets and separate "voices" that would exist if the merger were approved, the degree of cable penetration and the availability of other nonbroadcast media. As to television stations, we stated that we would consider the relevant ADI TV market, and as to radio, we stated that we would consider the relevant TV metro market.[4] In this regard, Clear Channel notes that the Tulsa ADI TV market (ranked 54th with 461,600 households) is served by eight television stations having eight separate owners. They include: KTUL-TV (ABC), channel 8; KWHB(TV)(IND), channel 47; KGCT-TV (IND),[5] channel 41; KJRH(TV)

(NBC), channel 2; KOKI-TV (IND), channel 23; KOTV(TV) (CBS), channel 6; KDOR(TV) (Trinity Broadcasting Network), channel 17; and KOED-TV (PBS), channel 11, all Tulsa, Oklahoma. Additionally, it states that the Tulsa metropolitan area is now served by 24 AM and FM radio stations having 17 separate owners. Moreover, it states that the Tulsa ADI is also served by 13 daily newspapers, 26 weekly newspapers and a total of 47 cable television systems, which have a 53% penetration (244,000 television households). *Second Report and Order, supra*, at 1753. In addition, it asserts that according to "Arbitron February 1989 VCR penetration estimates," the Tulsa market has 259,800 households owning VCR's, and this represents a VCR penetration rate of 56%.

DISCUSSION

9. In amending the one-to-a-market rule, the Commission emphasized that the new waiver policy was not an abandonment of its continuing concerns for encouraging diversity of voices and economic competition. *Second Report and Order*, 4 FCC Rcd at 1752. Thus, in evaluating requests for waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market area involved." *Memorandum Opinion and Order* in MM Docket No. 87-7, FCC 89-256 (released August 4, 1989). In the top-25 television markets, where 30 or more independent broadcast voices will remain, we have stated our inclination to accept an applicant's contention that vigorous diversity and competition will persist despite the merger of previously separately owned facilities. In other circumstances, where no claim of a "failed station" is availing, we have indicated that applicants must specifically demonstrate the public interest benefits of common ownership of stations ordinarily required by the one-to-a-market rule to be separately owned.

10. We find that the requested waiver does not fall within the Commission's failed station standard. The station at issue here has not been off-the-air for a substantial period of time or involved in bankruptcy proceedings. Further, a showing of a negative cash flow is not sufficient. *Second Report and Order*, 4 FCC Rcd at 1752 and n. 100. Accordingly, Clear Channel does not qualify for the presumptive relief afforded pursuant to the failed station standard. This does not mean, however, that relief is inappropriate. It is not necessary to invoke bankruptcy proceedings or to go dark in order to demonstrate the requisite financial distress applicable for consideration under the case-by-case criteria. Rather, documented financial difficulties that threaten station viability will be accorded substantial weight under that criteria. In this regard, we find persuasive Clear Channel's assertion that the station, more than eight years after it commenced operations, would be unable to continue payment of its current obligations absent continuing contributions from outside of the station and that the station is thus economically similar to a bankrupt station. Further, based upon our evaluation of the other factors in this case, we conclude that Clear Channel has justified a permanent waiver of the one-to-a-market rule to permit common ownership of Stations KOKI-TV, KAKC(FM) and KMOD-FM.

11. In fact, the requested waiver meets the public interest case-by-case criteria, set forth in paragraph 2, *supra*. First, Clear Channel has shown that substantial economic efficiencies will be realized from the combined operation of the stations and represents that these savings will contribute towards assuring the otherwise threatened continued operation of the station and the enhancement of its operations. In light of the specific financial data submitted, prior unsuccessful efforts to sell the station, and market history as reflected in the termination of operation of channel 41, we believe that the public benefits of granting this application are real and significant. Clear Channel has demonstrated that savings associated with the joint operation of the stations may offer the only likely opportunity for KOKI-TV to remain on the air and to become financially viable. *See Second Report and Order, supra*, at 1753. Further, compelling evidence is presented that the station had been marketed by several broadcast brokers for two years, without success, before Clear Channel made its offer. *See Second Report and Order, supra*, at 1753, n. 103. It is also significant that the Tulsa area has experienced a substantial decline in its economy, with a loss of 60,000 jobs, and that the station has been able to remain on the air only by imposing substantial cuts in programming and operating expenditures and receiving contributions of over $6,000,000 from its owners. Clear Channel has stated that finances from the successful operation of its AM and FM stations, its broadcast experience, and its substantial asset base will contribute substantially to the process of returning KOKI-TV to a viable profitable operation. *See Second Report and Order, supra*, at 1749 and 1753, n. 103. We do not think that further cuts in programming and operating expenditures or ceasing broadcast operation would serve the public interest. We believe that the circumstances of this case clearly indicate that the public interest benefits that will be derived from the proposed combination far outweigh any detriments.

12. Clear Channel has further demonstrated that the proposed common ownership would not create any undue concentration of control of the media. The Tulsa market is served by a variety of diverse media sources and has cable penetration of over 50%. *See* note 4, *supra*. Following a grant of the proposed combination, the Tulsa market will have 31 broadcast stations owned by a total of 24 separate owners. Thus, we do not find that common ownership of the subject stations would have any substantial adverse impact on the diversity of the media or competition in Tulsa or its surrounding area.

13. Based on the poor financial condition of the station threatening its very viability, the prolonged absence of any other interested purchaser, the efficiencies that will result from joint operation, the nature of the facilities involved,[6] and the minimal impact the proposed combination will have on marketplace diversity, and having determined that the applicants are fully qualified, we find that a grant of the application would serve the public interest, convenience and necessity.

14. Accordingly, IT IS ORDERED, That the request for a permanent waiver of the Commission's one-to-a-market rule, Section 73.3555(b), IS GRANTED; and the above-captioned application (BALCT-890310KF) for consent to the assignment of license of station KOKI-TV, Tulsa, Oklahoma, from Tulsa 23 to Clear Channel Television, Inc., IS GRANTED, effective on the date of adoption.

15. IT IS FURTHER ORDERED, That the petitions to deny filed by LeSea Broadcasting Corporation and jointly by the Tulsa, Oklahoma, Branch of the NAACP and the National Black Media Coalition ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Petitions to deny the subject application were filed by LeSea Broadcasting Corporation and jointly by the Tulsa, Oklahoma, Branch of the NAACP and the National Black Media Coalition. Following agreements among the parties, requests for withdrawal of the petitions were filed. Nevertheless, we have fully considered the matters set forth in the petitions and conclude that there are no substantial and material questions of fact that would warrant any further inquiry. *Booth American Co.*, 58 FCC 2d 553, 554 (1976). Accordingly, the petitions to deny will be dismissed.

[2] Clear Channel states that the 1988 expenses of KOKI-TV totaled $3,879,606. It claims that the savings directly related to the joint ownership of the radio and television stations, which will result from joint use of its accounting department, its computer systems, its existing management and staffs, as well as combining broadcast studios and facilities, will total approximately $387,000 yearly. In addition, it also claims that indirect savings of $395,000 per year will result from combining liability, property and health care costs, research regarding programming and sales efforts, as well as performing its own accounting and legal functions in house. Thus, it believes that a minimum of $750,000 per year, if not more, can be saved annually by combining the operations of the television and radio stations.

[3] An application (BALCT-890710KF) to assign the license of station KGCT-TV to a nonprofit corporation was granted on August 23, 1989.

[4] In responding to this factor, Clear Channel indicates that information was obtained from the following sources: *Broadcasting / Cablecasting Yearbook* (1988); *Televison & Cable Factbook* (1989); *Television & Cable Factbook (1988); and Editor & Publisher International Yearbook (1989).*

[5] Station KGCT-TV ceased operation on February 1, 1989, due to financial difficulties. Thus, the Tulsa ADI TV market is actually served by seven television stations.

[6] Although Clear Channel's FM station, KMOD(FM), is a Class C facility, its AM Station, KAKC(AM) is a directional Class III facility with reduced nighttime power and KOKI-TV is a UHF facility with a history of unprofitability.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

CANBY TELEPHONE ASSOCIATION — File No. 64400-86-63-AW

Notice of Apparent Liability for Forfeiture for failure to file Section 22.9(b) notification with respect to PLMS Station KNKG498 on Frequency 931.1625 MHz at Canby, Oregon

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 1990; Released: February 7, 1990

By the Chief, Mobile Services Division:

1. Canby Telephone Company (Canby) has filed a request for remission of the $2,630.00 forfeiture imposed by the Mobile Services Division in a Notice of Apparent Liability for Forfeiture (Notice).

I. BACKGROUND AND CONTENTIONS

2. On June 27, 1984, Canby was authorized to construct and operate Station KNKG498 on frequency 931.1625 MHz, file number 21293-CD-P/L-01-83. The required completion date for construction was June 27, 1985. Canby states that the facility was timely constructed on February 27, 1985. However, Canby concedes that it did not timely file a notification of completion of construction as required by Section 22.9(b)(1)[1]. According to Canby, failure to file was an inadvertent oversight caused by a change in personnel in Canby's Public Land Mobile Service operations. When the oversight was discovered in late February, 1986, Canby states that it immediately contacted counsel to prepare the necessary documents to notify the Commission of the error. On March 6, 1986, Canby requested special temporary authority (STA) to operate the station pending Commission action on its application for reinstatement which was filed on March 7, 1986. Canby's requested STA was granted by letter dated April 22, 1986.

3. On April 2, 1986, the Commission issued a Notice of Apparent Liability for Forfeiture in the amount of $2,630.00 for violation of Section 22.9(b)(1). The amount of the forfeiture was determined at the rate of $10 per day for 263 days of illegal operation of the system between the expiration of the authorization for KNKG498 on June 27, 1985, and the filing of Canby's application for reainstatement on March 7, 1986.

4. According to Canby, forfeitures are remedial sanctions designed to deter noncompliance with the law, and to motivate licensees to become familiar with the terms of their licenses and the applicable rules. In determining the amount of forfeiture for a rule violation, Canby maintains that the Commission is required to consider the nature, circumstances, extent and gravity of the violations, and regarding the violator, the degree of culpability, history of prior offenses, ability to pay and any other pertinent matters. *See* Section 1.80(b)(3) of the Commission's rules. Canby argues that in determining the amount of forfeiture levied against it, the Commission failed to consider the mitigating circumstances present in this case resulting in a forfeiture amount which Canby contends is clearly excessive.

5. Moreover, Canby argues that its violation was clearly unintentional, brought about by a change in personnel overseeing the operation of Canby's operations during the construction of Station KNKG498. Upon discovering the error, Canby took immediate measures to inform the Commission of construction of the facilities. Under these circumstances, Canby contends that there was no willful or repeated violation of Section 22.9(b)(1) warranting the large forfeiture amount imposed in this case. Canby argues that the unintentional nature of the rule violation is a mitigating factor justifying a reduction in the amount of the forfeiture citing *Tri - County Telephone Company, Inc.*, 54 Rad. Reg. (P&F) 1065 (Com. Car. Bur. 1983). Furthermore, Canby asserts that the imposition of a forfeiture where Canby voluntarily disclosed its violation does not promote the Commission's goal of deterring future violations.

6. In further support of its position, Canby states that station KNKG498 serves a rural area of Oregon and that during the period of the violation, the station generated only $861 in revenue. Operating costs estimated during this period were $29,308. Canby argues that because the station operating costs have greatly exceeded revenues during its first year of operation, the imposition of a substantial forfeiture will only serve to worsen the financial viability of Canby's paging operation during this critical period. Therefore, Canby requests that the Commission reduce the forfeiture amount to no more than $1 per day.[2]

II. DISCUSSION

7. In the notice assessing a forfeiture against Canby, the Chief of the Mobile Services Division found that service to the public that was provided on Station KNKG498 before its application for reinstatement was filed but after the expiration of its original authorization on June 27, 1985, was unauthorized and in violation of Section 22.9(b) of the Commission's rules. Canby has not presented any information warranting a change in that finding. The fact that corrective action was taken as soon as the licensee discovered the violation does not alter the fact that it existed and that the violation continued over a period of time. [3] We have previously noted that

> "(t)he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . . "

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397, (Com. Car. Bur., released February 16, 1983). Therefore, the fact that the violations resulted from a change in personnel does not persuade us to cancel the forfeiture.

8. However, on reconsideration, we are persuaded that, based on Canby's financial condition, the penalty amount assessed against Canby is excessive and unduly harsh. The financial data submitted by Canby demonstrates that its ability to serve the public could be affected by the amount assessed. This consideration is sufficient to warrant a reduction in the penalty. *See* Section 1.80(b)(3) of the rules. Therefore, the forfeiture amount is reduced to a total of $600.00 for failure to timely file FCC Form 489, pursuant to Section 22.9(b)(1) of the Rules.

9. In view of the foregoing, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the rules, IT IS ORDERED, that Canby Telephone Association forfeit to the United States the sum of six hundred dollars ($600) for the violation of Section 22.9(b) of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to be order of the Federal Communications Commission within 30 days of the release of this order. If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.9(b)(1) requires that a licensee file FCC Form 489 to notify the Commission when construction has been completed in accordance with the radio station authorization. This notification must be filed on or before the licensee commences service to the public.

[2] Canby submitted exihibits detailing the company's paging system revenues and its operating cost projection for the period June, 1985 through February, 1986.

[3] Section 503(b) of the Communications Act states, in pertinent part, as follows:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have . . .
>
> (B) . . . willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act . . .
>
> shall be liable to the United States for a forfeiture penalty.
>
> (2) . . . Each day of a continuing violation shall constitute a separate offense . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-90-029

Application for authority to acquire and operate facilities for direct service between the U.S. and the Cayman Islands.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 31, 1990; Released: February 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 30, 1989 by MCI Telecommunications Corp. (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and the Cayman Islands. The application was placed on public notice on December 13, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the Cayman Islands by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-029 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 36 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the Cayman Islands furnished by MCI's correspondent in the Cayman Islands;

b. own and operate 36 voice-grade circuits in the Andover, Maine earth stations;

c. own and operate 36 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and the Cayman Islands and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in the Cayman Islands, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-173

In re Applications of MM

COASTAL BROADCASTING PARTNERS, A Limited Partnership	File No. BPCT-851206KE
CATALINA 54 BROADCASTING, LTD., A California Limited Partnership	File No. BPCT-860207KJ
AVALON, CATALINA BROADCASTERS, INC.	File No. BPCT-860210KE
ES POSIBLE MINORITY MEDIA TELECOMMUNICATIONS, INC.	File No. BPCT-860210KH
CHRISTINE E. SHAW	File No. BPCT-860210KI
GOLDEN SHORES BROADCASTING, INC.	File No. BPCT-860210KJ
Patrick D. Sisneros d/b/a CATALINA BROADCASTERS	File No. BPCT-860210KK
ISLAND BROADCASTING LIMITED PARTNERSHIP, A California Limited Partnership	File No. BPCT-860210KM
AVALON BROADCASTING	File No. BPCT-860210KN
David H. Wagner d/b/a DHW COMMUNICATIONS	File No. BPCT-860210KO

For Construction Permit for
New Television Broadcast Facility at
Avalon, California

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1990; Released: February 8, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. This multi-party comparative proceeding is presently before the Review Board on exceptions. In a recent Memorandum Opinion and Order, *Coastal Broadcasting Partners*, 4 FCC Rcd 7512 (Rev. Bd. 1989), we directed two of the applicants -- Es Posible Minority Media Telecommunications, Inc., the winner below, and Christine E. Shaw -- to supplement the existing record in order to resolve outstanding questions pertaining to their applications. [1] Specifically with regard to Shaw, we noted several lingering questions concerning Administrative Law Judge Edward Luton's determination that Shaw was financially unqualified to be a Commission licensee. Rather than remanding at that time, we initially afforded Shaw an opportunity to submit additional financial data as specified at 4 FCC Rcd at 7513. It now appears, however, based on the supplemental information before us, that substantial and material questions of fact exist which can only be resolved by a further hearing. Accordingly, this proceeding will be returned to the ALJ pursuant to the instructions specified below. [2]

2. In accordance with our directions, Shaw has now submitted, *inter alia*, evidence of her financial condition as of the date of her application certification, appraisals of non-liquid assets relied upon, and evidence of her current financial condition. *See* Response of Christine Shaw, filed November 20, 1989, Exhibits 2A, 2B; Affidavit of Shaw. Our request for information was based both on the fact that Shaw presented no written documentation of her finances to the ALJ to substantiate her proposal and on recent Commission precedent affording applicants an opportunity to supplement the record with such documentation, where appropriate, to resolve outstanding questions. *See* Transcript of Oral Argument at 3536; *Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1989); *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-5519 (1989). In response to Shaw's submissions, Es Posible, Avalon, Catalina Broadcasters, Inc., Coastal Broadcasting Partners, and Catalina 54 Broadcasting, Ltd. all contend that Shaw is attempting to dramatically expand her financial proposal of record from reliance solely on proceeds from sale of her stamp and coin collection to a proposal to use all her assets and personal wealth for the station. In reply to these comments, Shaw states that she specifically and consistently proposed to finance the operation of the station not only with sums received from the liquidation of her stamps and coins but with all of her available assets, including such items as her paintings and horses, for which she has submitted appraisals of value. Shaw Reply, filed December 29, 1989, at 2-7.

3. It appears from our preliminary review of Shaw's submitted affidavits, appraisals, and other financial documentation that, if her proposal was originally as she now describes it, she may indeed have had the financial wherewithal to finance the proposed station at the time of her application. However, the strenuous objections of each of the commenting parties make plain that there is now presented a substantial and material question of fact as to what exactly Shaw's financial proposal was at the time of certification, and whether she is now seeking, without

proper amendment, to materially alter that proposal to her benefit. We cannot resolve this matter, nor definitively assess Shaw's financial qualifications on the basis of the information and conflicting allegations currently before us; therefore, remand is necessary to determine whether Shaw may properly rely on all of the assets she now documents and, if so, whether she is to be found financially qualified on that basis. Consequently, it will be necessary at the hearing to determine, and for Shaw to document: (1) her originally projected costs of construction and initial three months of operation; and (2) the *specific* assets she relied upon to meet those costs at the time she filed her application. [3] If Shaw is found financially qualified in light of the new evidence adduced, the ALJ must also consider whether her disqualification under the lack of candor/misrepresentation issue, which was premised largely on her failure to have the necessary documentation of her finances at the time of certification, should be revisited. *See Opal Chadwell*, 4 FCC Rcd 1215 (1989) (case remanded on financial issue to resolve substantial questions of fact after submission of documentation including appraisals); *cf. Evangel Communications, Inc.*, 4 FCC Rcd 3629 (Rev. Bd. 1989) (remand ordered on technical issue to resolve conflicting allegations after supplemental comments received). [4]

4. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for further hearing consistent with this opinion and for the preparation of such Supplemental Initial Decision as may be warranted by a supplemental record.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] To date, the following pleadings have been filed in response to our directions: (a) Response of Christine Shaw to Order of the Review Board in FCC 89R-61, filed November 20, 1989; (b) Submission of Documents, filed November 20, 1989, by Es Posible; (c) Comments of Avalon Catalina Broadcasting, Inc. upon Response of Christine Shaw, filed November 22, 1989; (d) Comments of Christine Shaw to Submission by Es Posible, filed November 30, 1989; (e) Comments by Coastal Broadcasting Partners, filed December 1, 1989; (f) Comments on Christine Shaw's Record Supplement, filed December 12, 1989 by Coastal Broadcasting Partners; (g) Comments of Es Posible on Shaw's Response, filed December 12, 1989; (h) Comments of Catalina 54 Broadcasting, Ltd. on Submission by Shaw, filed December 12, 1989; (i) Erratum, filed December 13, 1989, by Coastal Broadcasting Partners; (j) Motion for Leave to File Additional Submission of Documents, filed December 12, 1989, by Es Posible; (k) Additional Submission of Documents, filed December 12, 1989, by Es Posible; (l) Motion for Leave to File Reply and Supplemental Affidavit, filed December 29, 1989, by Shaw; (m) Reply to Comments, filed December 29, 1989, by Shaw; (n) Opposition to Motion for Leave to File Reply, filed January 2, 1990, by Avalon, Catalina Broadcasting, Inc., (o) Response to Reply of Shaw, filed January 3, 1990 by Catalina Broadcasters; (p) Motion for Leave to File Clarification, filed January 4, 1990 by Es Posible; (q) Clarification, filed January 4, 1990, by Es Posible.

[2] We will hold in abeyance our consideration of the submissions pertaining to the Es Posible application until such time as the proceeding is ripe for final disposition.

[3] Thus, for example, Avalon Catalina Broadcasters, Inc. recites the following language from Shaw Exhibit 3 at 1-2:

> To meet these costs, I intend to liquidate stamp and coin holdings which I have accumulated throughout my lifetime. . . .
>
> I estimate that liquidation of my coin and stamp collections will yield in excess of Nine Hundred Thirty Thousand Dollars ($930,000). This more than covers the aforementioned need for $919,783.10.
>
> I have no current or long-term liabilities to which any portion of the proceeds of the sale of the stamp and coin collection will be diverted. . . .
>
> Before filing my application in this proceeding, I took several measures to be assured that I was financially qualified to be a Commission licensee. . . . We determined the liquidity of several of my assets which I wish to commit to the proposed station, specifically the stamp collection I have already mentioned.

By contrast, Shaw refers, *inter alia*, to her testimony at Tr. 3142-43 as follows:

> Q. When you began to put together your financial qualifications prior to the time that you filed your application, you told us that you considered your assets, and what assets did you take into consideration here? You've mentioned stamps.
>
> A. You're asking me before I actually --
>
> Q. That's right.
>
> A. -- started to liquidate things? I just thought about everything I own, and many of the things that I owned, if I wanted to get a station together, I wouldn't need an awful lot of them, especially the horses, which I probably wouldn't have any time for except for maybe a couple of them, like my stallion, because I don't show him, and it's not necessary to be present when he's breeding.
>
> So, everything that I own was going to go into the application, whatever it would take. I didn't need to have much because of the fact I was going to move to Avalon, and to carry a bunch of paintings and try to move my horses on a small little island isn't necessary. So the best thing to do is just to simplify my life and try and start over.
>
> Q. All right. You mentioned the horses. You mentioned the art. You've told us that you plan to sell your stamps and your coins. Does this listing that is attached to Wilshire Stamp Company Consignment Agreement, is that your entire stamp and coin collection?
>
> A. I have a few other things, but I didn't feel it was necessary to disclose everything because, at the time, everything wasn't going to be sold. I only needed to have a certain amount of finances to prove that I can run the

> station for the 90 days, and this is what I decided I really didn't have any interest in anymore, and this is what I was willing to give up to acquire the station.

Making the matter further unclear is the newly-supplied affidavit of Shaw's accountant, Gary E. Crane (Exhibit 2B), in which he avers that Shaw instructed him to establish a special reserve account with the proceeds of her stamp and coin collection, with an eye towards accumulating $900,000 for FCC purposes. However, while claiming that Shaw's reserve account has been "seasoned" already with $278,000 from the Wilshire Stamp Company, Crane also shows only a $92,000 cash balance, thus suggesting that approximately $190,000 of the *originally* anticipated $900,000 stamp and coin proceeds has been spent. Since Shaw could not have been *initially* relying on interest payments from Wilshire Stamp, Shaw must explain any discrepancy between her original cost estimates for the broadcast station and her anticipated stamp and coin proceeds, assuming that Crane's FCC reserve account was (as he stongly suggests) Shaw's expected source of station financing.

[4] Because this case is being remanded for the reasons set forth above, we also direct the ALJ to provide a comparative evaluation of Shaw's application *vis a vis* the competing applicants. The *I. D.*, while containing comparative findings as to Shaw at para. 191, did not compare her to other applicants claiming 100% integration credit in the ultimate conclusions at paras. 209-216. The Commission's Rules, 47 C.F.R. 1.267 (b), require that ALJs make findings *and conclusions* on all material issues, and the Commission and Board have adverted to the need for such conclusions, even on contingent issues, in order to obviate unnecessary remands. *See Alkima Broadcasting Co.*, 30 FCC 932, 933 n. 2 (1961); *Port Huron Family Radio Inc.*, 4 FCC Rcd 2532, 2540 n. 1 (Rev. Bd. 1989); *Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1609 n. 2 (Rev. Bd. 1985); *Country Broadcasting Co.*, 71 FCC 2d 1222, 1229 n. 12 (Rev. Bd. 1979).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Capital Cities/ABC, Inc.,
Complainant,

v. File No. E-88-111

New York Telephone Company,
Defendant;

and

In the Matter of

CBS, Inc.,
Complainant,

v. File No. E-88-114

New York Telephone Company,
Defendant.

ORDER

Adopted: January 12, 1990; Released: February 8, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. Capital Cities/ABC, Inc. (ABC) and New York Telephone Company (NYT), parties to formal complaint File No. E-88-111, and CBS Inc. (CBS) and NYT, parties to formal complaint File No. E-88-114, have filed joint motions seeking dismissal of these complaints with prejudice. For reasons set out herein, we grant the joint motions.

2. The complaints were filed in August of 1988 and, although the facts differ somewhat, these differences are not relevant to a resolution of the issues presented by the joint motions. Both complainants ABC and CBS alleged violations by NYT of 47 U.S.C. §§ 201(b), 202(a) and 203(c), specifically concerning charges assessed by NYT against complainants for service provided on certain one-way television transmission circuits located within the City of New York. NYT denied the allegations, and moved to dismiss both complaints. Under the auspices of the Enforcement Division, the parties subsequently undertook settlement negotiations which resulted, according to the parties, in mutually agreeable settlements which resolve the matters in controversy in each complaint proceeding.

3. On the basis of the statements contained in the joint motions for dismissal of complaint filed in these proceedings, we conclude that there are no longer issues in controversy and that the proceedings should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the Joint Motion for Dismissal of Formal Complaint filed on December 21, 1989, in formal complaint File No. E-88-111, IS GRANTED.

5. IT IS FURTHER ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the Joint Motion for Dismissal of Formal Complaint filed on December 21, 1989, in formal complaint File No. E-88-114, IS GRANTED.

6. IT IS FURTHER ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the above-captioned formal complaints are DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Notification of Broadcast Auxiliary
studio-transmitter-link/inter-city
relay (STL/ICR) transmitters

ORDER

Adopted: January 12, 1990; Released: January 18, 1990

By the Chief, Mass Media Bureau:

1. On October 31, 1985, the Commission adopted a *Report and Order* in MM Docket No. 85-36, which required that effective December 16, 1985, studio-transmitter-link/inter-city relay ("STL/ICR") transmitters to be operated in the 944-952 MHz band possess a grant of notification prior to being marketed. Transmitters marketed prior to the effective date of the new rule were to be "grandfathered" for a five year period ending on June 30, 1990. On or after July 1, 1990, all STL/ICR transmitters must have received a grant of notification. This requirement was adopted to ensure that all STL/ICR transmitters would meet long-standing (and unchanged) technical standards and to encourage the production of STL/ICR equipment capable of using narrower bandwidths. The latter effect was considered particularly important in view of increasing demands being placed on STL/ICR spectrum, particularly in larger urbanized areas.

2. On November 8, 1989, the Commission received a letter from Booth, Freret and Imlay, counsel for the Society of Broadcast Engineers ("SBE"). The letter notes that traditionally, new technical rules will "grandfather" existing equipment from compliance, but that this was not done in MM Docket No. 85-36 because of the expectation of extreme STL band congestion. However, SBE notes that with few exceptions, new users of the STL band have been accomodated without recourse to the narrowbanding provisions adopted in MM Docket No. 85-36. SBE also indicates that 40% of stations use STL equipment, most of which is of pre-1985 manufacture, that the cost of bringing each of these stations into compliance with the notification requirement would be roughly $2000 per station, and that STL equipment manufacturers would not be able to upgrade all of the equipment by July 1, 1990. Finally, SBE argues that while the broadcast industry will be adversely affected by strict adherence to the equipment notification requirement, it will not receive any benefit from it. Noting that licensees will still have the responsibility to prove at all times that their STL systems are functioning properly, SBE requests that the Commission suspend the STL equipment notification requirement for three additional years.

3. On December 19, 1989, the Commission received a similar request from National Public Radio ("NPR") for an indefinate "grandfathering" of STL equipment or, at a minimum, a three year delay in the effective date of the equipment notification requirement. NPR provides limited statistics suggesting that roughly 70% of public radio stations use STL links and that there may be an average of 1.6 STL transmitters in use per station (many stations having backup equipment). NPR estimates the cost of bringing each station into compliance with the equipment notification requirement to be $4573. This expense would need to be met largely from funds made available from NTIA's Public Telecommunications Facilities Program and these funds will be inadequate unless equipment upgrade can be spaced over a three or four year period. Like SBE, NPR argues that because unforeseen developments in the broadcast marketplace have led to less congestion than was originally anticipated, giving these broadcasters the requested relief would not harm others. NPR also expresses the belief that the proper use of antenna systems, transmitter combiners and tuning procedures are more likely than the application of the Commission's equipment authorization program to avoid or correct any cases of interference which may develop. According to NPR, where such equipment causes interference, provisions in §74.535(c) of the Commission's Rules will continue to require licensees to take whatever steps are necessary to correct the problem. Thus, because the economic hardship in complying with the notification requirement will be great, and because no significantly adverse consequences will result from the Commission's granting the requested relief, NPR requests a waiver of §74.550, or in the alternative, a three year postponement in the effective date of the rule.

4. The arguments of SBE and NPR have been repeated in recent letters and telephone inquiries by both public and commercial broadcast licensees.

5. It appears that only recently did many broadcasters using STL/ICR equipment begin to investigate the costs associated with the upgrades required as a result of the equipment notification requirement, and that much of the current concern is due to their lack of planning. By the same token, the STL band congestion has not developed to the extent anticipated back in 1985. This circumstance, more than any other, persuades us that a delay in the effective date of the equipment notification requirement in §74.550 is not likely to have any significantly adverse impact on STL/ICR service. Nevertheless, we wish to emphasize that while we will grant the requested delay, all existing STL/ICR equipment must comply with the current technical standards and must be notified by July 1, 1993, if it is intended to be used after that date. Consequently, this delay should not be interpreted as modifying our intent to require licensees to use more spectrum efficient bandwidths in congested areas where there is a need to accomodate new STL/ICR service entrants. In sum, while the equipment notification requirement will be deferred, the other rules adopted in MM Docket No. 85-36, which are intended to foster more efficient use of the STL/ICR spectrum, are being retained and will continue in full effect.

6. Accordingly, pursuant to the authority contained in Sections 0.283 and 0.61 of the Commission's Rules, 47 C.F.R. §§0.283 and 0.61, the requirement contained in §74.550 that operation of 944-952 MHz equipment not approved under the equipment authorization program may continue until July 1, 1990, after which such equipment must be approved, IS WAIVED until July 1, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 74 is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

Authority: 47 USC Sections 154 and 303.

2. Section 74.550 is amended by revising the date in the first sentence to read as follows:

Section 74.550 Equipment authorization.

Each authorization for aural broadcast STL, ICR, and booster stations shall require the use of notified or type accepted equipment, except that operation of 944-952 MHZ equipment which has not been approved under the equipment authorization program may continue until July 1, 1993, after which equipment must be approved.

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VIRGINIA METRONET, INC. d/b/a/
CENTEL CELLULAR COMPANY OF VIRGINIA

Notices of violations of
Commission's Part 17 marking and
lighting rules regarding the
construction of two antenna
structures in the Norfolk-Virginia
Beach-Portsmouth, Virginia
Metropolitan Statistical Area to
provide cellular service from
Domestic Public Cellular Radio
Service Station KNKA330

ORDER

Adopted: January 30, 1990; Released: January 31, 1990

By the Commission: Commissioner Marshall not participating.

1. On June 20, 1989 and October 3, 1989 the staff of the Field Operations Bureau issued two separate Notices of Violation (Notices) to Virginia Metronet, d/b/a/ Centel Cellular Telephone Company of Virginia (Virginia Metronet). Both Notices advised Virginia Metronet that on two separate occasions it apparently had violated several Part 17 marking and lighting rules. Virginia Metronet responded to each Notice, denying that it had violated Commission rules. Virginia Metronet is wholly owned by Centel Cellular Telephone Company (Centel Cellular).

2. The Commission and Centel Cellular have reached an agreement that would resolve these matters, the terms and conditions of which are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are hereby incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree, incorporated by reference herein, is hereby adopted and that the Secretary shall sign such Consent Decree on behalf of the Commission.

5. IT IS FURTHER ORDERED that the above-referenced Notice of Violation proceedings against Virginia Metronet are hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

In the Matter of

Notice of Violation of
June 20, 1989 of

VIRGINIA METRONET, INC.
dba Centel Cellular Company
of Virginia
8725 Higgins Road
Chicago, IL 60631

Notice of Violation of
October 3, 1989 of

VIRGINIA METRONET, INC.
dba Centel Cellular Company
of Virginia
8725 Higgins Road
Chicago, IL 60631

CONSENT DECREE

1. In March 1989, the Federal Communications Commission ("Commission") instituted an investigation into the collision of a helicopter with an antenna tower owned by Virginia Metronet Inc. ("Virginia Metronet") in Coinjock, North Carolina. As a result of the investigation, the Commission issued a Notice of Violation on June 20, 1989, specifying the following infractions:

(a) Section 17.45: On March 26, 1989, there were no temporary warning lights in operation on the cellular system antenna structure under construction at Coinjock, NC. During construction of an antenna structure, at least two appropriate lamps shall be installed at the uppermost point of the structure. In addition, as the height of the structure exceeds each level at which permanent obstruction lights will be required, two similar lights shall be installed at each such level. These temporary warning lights shall be displayed nightly from sunset to sunrise.

(b) Section 17.46: During the period March 27 through April 18, 1989, there was an inappropriate top beacon (strobe vs. red beacon) and there were no side lights in operation on the cellular system antenna structure at Coinjock, NC. Structures between 300 and 450 feet in height must have a flashing top beacon and appropriate sidelights in-

stalled at levels corresponding to 1/3 and 2/3 of the overall height of the structure or comply with FAA recommendations.

(c) Section 17.48: On March 26, 1989, the FAA was not notified that the temporary warning lights on the antenna structure were not operational. The licensee of any radio station which has an antenna structure requiring illumination shall report immediately by telephone or telegraph to the nearest office of the FAA any observed improper functioning of any top steady burning light.

2. As a result of a report of near-collision in September 1989, of a helicopter with an antenna tower owned by Virginia Metronet in Portsmouth, Virginia, the Commission investigated and, on October 3, 1989, issued a Notice of Violation specifying the following infraction:

On September 29, 1989, there were no temporary warning lights in operation on the cellular system antenna structure under construction at 606 Chautauqua Ave, Portsmouth, VA. During construction of an antenna structure, at least two appropriate lamps shall be installed at the uppermost point of the structure. In addition, as the height of the structure exceeds each level at which permanent obstruction lights will be required, two similar lights shall be installed at each such level. These temporary warning lights shall be displayed nightly from sunset to sunrise.

3. For purposes of this Consent Decree, the following definitions apply:

(a) "Common Carrier Bureau (Bureau)" means the Common Carrier Bureau of the Federal Communications Commission;

(b) "Centel Cellular Company" means that corporation, Virginia Metronet, Inc., or any other affiliated entity, subsidiary, or successor;

(c) "Order" means an order of the Bureau or Commission adopting the terms and conditions of this Consent Decree and formally disposing of the above-captioned proceedings against Centel Cellular Company;

(d) "Effective date of this Consent Decree" is the date that the Commission releases its Order adopting the terms and conditions of this Consent Decree.

4. Centel Cellular Company admits the jurisdiction of this Commission over it and over the subject matter of this action for the purposes of this Consent Decree and any Order.

5. Centel Cellular Company agrees that upon signing by the Commission and Centel the provisions of this Consent Decree shall be incorporated by reference in any Order, as described in paragraphs 8 and 12 below, formally adopting this Consent Decree and terminating the Notice of Violation proceedings.

6. Centel Cellular Company waives any rights it may have to appeal any Order, as described in paragraphs 8 and 12 below.

7. In consideration for the termination by the Commission of these proceedings in accordance with the terms of this Consent Decree, Centel Cellular Company agrees to the following terms, conditions and procedures that the parties believe will facilitate a fair and expeditious resolution of the above-captioned proceedings in a manner that would serve the public interest. Centel Cellular Company agrees to the following terms, conditions and procedures without admitting any of the alleged violations set forth in either Notice of Violation, or admitting any other violations of law, rules or policy.

(a) Centel Cellular Company agrees to make a voluntary contribution to the United States Treasury, without further protest, or recourse to a trial *de novo*, in the amount of $1,000,000 within 5 days of the date on which the Order is released in recognition of the costs of enforcement efforts which ensure the safety of air traffic around communications equipment.

(b) Centel Cellular Company agrees to abide by the terms of the Centel Tower Construction Safety Procedure and Obstruction Lighting Routine, submitted to the Commission on October 30, 1989, which is incorporated herein by reference.

(c) Centel Cellular Company agrees to conduct in calendar years 1990 and 1991 an antenna tower lighting and marking safety educational and awareness campaign directed to the cellular communications industry. That campaign shall include advertisements, articles or announcements of an educational and informational nature in national publications and other media, including the communications industry trade press; the production and distribution of a training booklet or brochure concerning Part 17 marking and lighting requirements directed to antenna tower construction companies, consulting engineers and licensees; and the sponsorship or participation in seminars and information booths at national cellular communications industry conventions regarding antenna marking and lighting requirements, including the distribution of pamphlets and other written handouts. The campaign will be coordinated with the Commission's Field Operations Bureau, Public Service Division, to ensure proper interpretation of the Commission's rules under Part 17. Centel Cellular Company agrees to furnish the Public Service Division a semi-annual report of its campaign efforts.

8. In light of the covenants and representations contained in paragraphs 3-7, *supra*, and in express reliance thereon, the Commission agrees to issue a Order terminating any proceedings arising as a result of the Notices of Violation issued by the Commission against Centel Cellular Company, and the Commission further agrees that this document serves to resolve all issues arising from allegations of violations of Commission rules by Centel Cellular Company that are the subject of the Notices referenced in paragraphs 1 and 2 above. Acceptance by the Commission shall constitute a decision to terminate the Notice of Violation proceedings without any finding of violation or liability on the part of Centel Cellular Company or necessity for sanctions against Centel Cel-

lular Company. The Commission further agrees that the allegations and other circumstances involved in the Notices of Violation will not be used against Centel Cellular Company or any station licensed to, authorization held by, or application filed by Centel Cellular Company in any other current or future proceeding.

9. In terminating the Notice of Violation proceedings, the Commission agrees that it will not institute new proceedings of any kind arising out of conduct on which either of the Notice of Violations was based or conduct associated with those matters identified in paragraph 7 prior to the effective date of this Consent Decree. The Commission represents that as of the effective date of this Consent Decree, it has not recommended, and further agrees that it will not recommend, to any other agency of the United States with authority to enforce civil or criminal penalties arising from conduct set forth in the Notices of Violation, that such agency take any action against Centel Cellular Company.

10. Centel Cellular Company agrees that any violation of the Order or of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

11. The parties further agree that the effectiveness of this Consent Decree is expressly contingent upon termination of the Notice of Violation proceedings, issuance of an Order as described herein, and Centel's compliance with the terms and conditions in paragraphs 3-7, 10 and 12. If the Consent Decree is not signed by both parties or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and shall not become part of the record in the Notice of Violation Proceedings nor may it be used in any fashion by any party in a legal proceeding.

12. If the Commission brings an action in United States District Court to enforce the terms of the Order, Centel Cellular Company agrees that it will not contest the validity of the Order, will waive its statutory right to a trial *de novo* and will consent to a judgment incorporating the terms of this Consent Decree.

For the Federal Communications Commission

For Centel Cellular Company

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-90-022

Application for authority to acquire and operate facilities for direct service between the U.S. and Malaysia

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 31, 1990; Released: February 8, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 3, 1989 by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for direct service between the U.S. and Malaysia. The application was placed on public notice on November 8, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Malaysia by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-022 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between the San Ramon, California earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Malaysia furnished by US Sprint's correspondent in Malaysia; and

b. use said facilities to provide US Sprint's regularly authorized services, including switched voice service, between the U.S. and Malaysia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Malaysia, and a copy of the agreement shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NORTH AMERICAN COMMUNICATIONS, INC. File No. I-T-C-90-030

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 31, 1990; Released: February 8, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 20, 1989 by North American Communications, Inc. (North American), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on December 13, 1989. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by North American.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-030, IS GRANTED, and North American is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, Satellite Business System's Tariff F.C.C. No. 4 and RCI's Tariff F.C.C. No. 2, between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-90-020

Application for authority to acquire and operate facilities for direct service between the U.S. and Guatemala Costa Rica and Honduras.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 2, 1990; Released: February 8, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 31, 1989, by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for the provision of direct service between the U.S. and Guatemala, Costa Rica and Honduras. The application was placed on public notice on November 8, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Guatemala, Costa Rica and Honduras by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-020 IS GRANTED, and TRTI is authorized to:

a. lease from Comsat and operate 12 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, and 14 voice-grade satellite circuits between the Roaring Creek, Pennsylvania earth station and an appropriate satellite over the Atlantic Ocean connecting with similar circuits between the satellites and earth stations in Guatemala, Costa Rica and Honduras furnished by TRTI's correspondents in those countries;

b. lease from AT&T and operate 12 voice-grade circuits in the Etam, West Virginia earth station and 14 voice-grade circuits in the Roaring Creek, Pennsylvania earth station;

c. lease and operate necessary domestic connecting facilities; and

d. use said facilities to provide TRTI's regularly authorized services between the U.S. and the following points and beyond:

1. Guatemala - 12 voice-grade circuits;
2. Costa Rica - six voice-grade circuits;
3. Honduras - eight voice-grade circuits.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between TRTI and its correspondents in Guatemala, Costa Rica and Honduras and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-90-023

Application for authority to acquire and operate facilities for direct service between the U.S. and Singapore

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 2, 1990; Released: February 8, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 6, 1989, by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate satellite and connecting facilities for the provision of direct service between the U.S. and Singapore. The application was placed on public notice on November 15, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Singapore by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-023 IS GRANTED, and TRTI is authorized to:

a. lease from Comsat and operate six voice-grade satellite circuits between the Jamesburg, California earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Singapore furnished by TRTI's correspondent in Singapore;

b. acquire from AT&T and operate six voice-grade circuits in the Jamesburg, California earth station;

c. lease and operate six voice-grade connecting circuits between the Jamesburg, California earth station and TRTI's New York Office; and

d. use said facilities to provide TRTI's regularly authorized services, including switched voice service, between the U.S. and Singapore and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Singapore, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-90-018

Application for authority to lease and operate satellite circuits for service between the U.S. and the Caribbean area, Central America, South America and Africa.

ORDER AND AUTHORIZATION

Adopted: February 5, 1990; Released: February 8, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 1, 1989 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate additional satellite circuits for the provision of service between the U.S. and the Caribbean area, Central America, South America and Africa for the years 1990, 1991 and 1992. AT&T is currently authorized to lease and operate up to a total of 6,860 voice-grade satellite circuits, through year-end 1989, for service to the points listed in the attached Appendix.[1] The application was placed on public notice on November 8, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-018 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate up to a total of 7,339 voice-grade satellite circuits for 1990, up to a total of 7,918 voice-grade circuits for 1991 and up to a total of 8,633 voice-grade satellite circuits for 1992 between the U.S. and the points listed in the Appendix;

b. lease one-half interests in and operate necessary overseas transiting facilities;

c. lease and operate connecting voice-grade circuits between the U.S.-Canada border and the Mill Village, Nova Scotia, Canada earth station as needed for restoration purposes;

d. lease from Comsat and operate up to the maximum number of SPADE circuits available at the Etam, West Virginia earth station for the provision of communications service between the U.S. and those countries listed in the Appendix at which a SPADE terminal is available;

e. lease and operate satellite voice-grade circuits in excess of the numbers specified in subparagraph (a) in 1990 and 1991, up to the 8,633 satellite voice-grade circuits authorized for 1992; and

f. use said facilities to provide AT&T's regularly authorized services between the U.S. and the points listed in the attached Appendix and beyond, during the years 1990, 1991 and 1992.

3. All other terms and conditions of the Commission's blanket authorization, cited in paragraph 1 above, remain the same.

4. AT&T shall file a new application for satellite circuits beyond 1992 for service between the U.S. and the Caribbean area, Central America, South America and Africa on or before October 1, 1992.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* Commission's Orders released on December 31, 1985 (Mimeo No. 1687, File No. I-T-C-86-019), March 24, 1986 (Mimeo No. 3322, File No. I-T-C-86-061), October 17, 1988 (DA 88-1563 File No. I-T-C-88-182, 3 FCC Rcd 6061 (1988)), Jan. 12, 1989 (DA 88-2064, File No. I-T-C-89-019, 4 FCC Rcd 571 (1989)).

APPENDIX

Caribbean

Antigua
Aruba
Bahamas
Barbados
Bermuda
Cayman Islands
Dominican Republic
French Antilles
Grenada
Haiti
Jamaica
Netherlands Antilles
St. Lucia
St. Vincent
Trinidad
Turks and Caicos

Africa

Algeria
Angola
Benin
Botswana
Burkina Faso
Cameroon
Cape Verde Islands
Congo
Ethiopia
Gabon
Gambia
Ghana
Guinea
Ivory Coast
Kenya
Lesotho
Liberia
Malawi
Mali
Mauritania
Morocco
Mozambique

Africa cont.

Niger
Nigeria
Senegal
Sierra Leone
South Africa
Sudan
Swaziland
Tanzania
Togo
Uganda
Zaire
Zambia
Zambabwe

Central America

Belize
Costa Rica
El Salvador
Guatemala
Honduras
Nicaragua
Panama

South America

Argentina
Bolivia
Brazil
Chile
Colombia
Ecuador
French Guiana
Guyana
Paraguay
Peru
Suriname
Uruguay
Venezuela

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-90-021

Application for authority to lease and operate satellite circuits for service between the U.S. and Europe, the Middle East and North Africa.

ORDER AND AUTHORIZATION

Adopted: February 5, 1990; Released: February 8, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 1, 1989 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate additional satellite circuits for the provision of service between the U.S. and points in Europe, the Middle East and North Africa which are not members of CEPT (the conference of 26 European Post/Telecommunications Administration) for the years 1990, 1991 and 1992. AT&T is currently authorized to lease and operate up to a total of 2,084 voice-grade satellite circuits, through year-end 1989, for service to the points listed in the attached Appendix.[1] The application was placed on public notice on November 8, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-021 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate up to a total of 2,430 voice-grade satellite circuits for 1990, up to a total of 2,660 voice-grade satellite circuits for 1991 and up to a total of 2,871 voice-grade satellite circuits for 1992 between the U.S. and Europe, the Middle East and North Africa (non-CEPT points) as listed in the Appendix hereto;

b. lease one-half interest in and operate necessary overseas connecting and/or transiting facilities;

c. lease and operate satellite circuits in excess of the numbers specified in subparagraph (a) in 1990 and 1991, up to the 2,871 satellite voice-grade circuits authorized for 1992; and

d. use said facilities to provide AT&T's regularly authorized services between the U.S. and the points listed in the attached Appendix and beyond, during the years 1990, 1991 and 1992.

3. All other terms and conditions of the Commission's Order and Authorization released December 7, 1982, File No. I-P-C-82-045, remain the same.

4. AT&T shall file a new application for satellite circuits beyond 1992 for service betwen the U.S. and Europe, the Middle East and North Africa on or before October 1, 1992.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX
NON-CEPT COUNTRIES INCLUDED IN AT&T'S SATELLITE BLANKET (1/1/1990 - 12/31/1992)

Europe
Bulgaria
Czechoslovakia
German Dem. Rep.
Gibraltar
Hungary
Poland
Romania
USSR

North Africa
Egypt
Libya
Tunisia

Middle East
Bahrain
Diego Garcia
Iran
Iraq
Israel
Jordan
Kuwait
Lebanon
Oman
Pakistan
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen Arab Republic

FOOTNOTE

[1] The Commission's Order and Authorization released December 7, 1982 (File No. I-P-C-82-045) granted AT&T authority to lease and operate satellite circuits to non-CEPT countries for 1983, 1984 and 1985. This blanket authority was extended to year-end 1986 by an order released on December 31, 1985 in File No. I-T-C-86-018, and extended to year-end 1987 by an order released on December 31, 1986 in File No. I-T-C-87-010. *See* 1 FCC Rcd 1368 (1986). The Commission's Order and Authorization, DA 87-1881, released January 7, 1988 (File No. I-T-C-88-023) further extended AT&T's authority until December 31, 1988. *See* 3 FCC Rcd 36 (1988). The Commission's Order and Authorization, DA 88-2013, released January 12, 1989, File No. I-T-C-89-017 further extended AT&T's authority until December 31, 1989. *See* 4 FCC Rcd 546 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Radio Control (R/C) Radio Service Rules to Permit Model Surface Craft Channels to be Used for the Remote Control of Industrial Cranes. RM-6665

ORDER

Adopted: November 16, 1989 Released: November 27, 1989

By the Acting Chief, Private Radio Bureau:

I. INTRODUCTION

1. This *Order* denies a request by Robinson Engineering Company (Robinson)[1] to permit channels available for the remote control of model surface craft (*e.g.*, model cars and boats) in the Radio Control (R/C) Radio Service to be used for the control of industrial cranes. The *Order* also denies a waiver request filed by Robinson concerning the same issue.

II. BACKGROUND

2. On January 18, 1989, Robinson by its attorneys, filed a petition (RM-6665) requesting that Part 95, Subpart C, of the Commission's Rules for the Radio Control (R/C) Radio Service, 47 C.F.R. Part 95, Subpart C, be amended to provide that the channels currently allocated only for remote control of model surface craft be shared with industrial users, such as Robinson's customers.[2]

3. Robinson argues that use of private land mobile radio service channels, available in the Manufacturers Radio Service under Part 90 of the Commission's Rules, 47 C.F.R. Part 90, causes hardship to Robinson's operations because (1) its customers cannot meet the land mobile service eligibility requirements, (2) there are insufficient land mobile channels available to meet their needs, and (3) available land mobile channels are not protected from interference from Radio Common Carrier (RCC) operations. Robinson states that frequent interference to land mobile service operations compels those licensees to seek channel changes, re-coordination, and license modification.

4. Robinson avers that it was unaware, until recently, that the R/C Radio Service 72-76MHz channels are restricted to recreational uses. Robinson submits that not a single complaint of interference to any radio service has been received by any of its customers using Robinson's remote control devices transmitting on the R/C Radio Service channels. Robinson believes that the operation of its equipment makes no significant contribution to interference levels on model surface craft channels, and that model surface craft users could easily share their channels with industrial users. Robinson alleges that it would be detrimental to its small but growing business if industrial users could not share the model surface craft channels. Thus, Robinson requests relief in the form of a rule amendment that would provide for sharing of the 75-76 MHz channels by operators of model surface craft and operators of remotely controlled industrial cranes.

5. On March 6, 1989, The Academy of Model Aeronautics, Inc. (AMA) filed an opposition to Robinson's petition. In response to Robinson's statements that some of its customers are not eligible for licenses in the Manufacturers Radio Service and that there is an insufficient number of channels to meet its needs, AMA argues that these same customers would be eligible in the Business Radio Service where suitable channels are available for remote control of industrial devices. The AMA notes that Robinson does not assert that its customers would experience less interference from RCC operations on R/C Radio Service model surface craft channels than on land mobile channels. The AMA concludes that Robinson is, in reality, not seeking the R/C Radio Service channels, *per se*, but rather is attracted to the R/C Radio Service because there is no licensing requirement. The AMA also opposes Robinson's petition on safety grounds, noting particularly that remotely controlled model surface craft (*e.g.*, model cars) could easily be in the proximity of an industrial remote control device.

6. On March 21, 1989, Robinson replied to AMA's opposition. Robinson maintains that its radio control devices incorporate circuitry designed to prevent unsafe operation in the presence of interference. The controlled device will automatically stop if the undesired signals become intolerable. Robinson states that no unacceptable interference from R/C Radio Service transmitters has occurred at an industrial location. Robinson also argues that Business Radio Service channels are inadequate for simultaneously controlling multiple industrial bridge cranes.

7. Finally, Robinson emphasizes that it does not seek to curtail the use of R/C Radio Service channels by modelers, but only wants to share their channels. Robinson also states that the interference from RCC operations would be less severe on the R/C Radio Service channels because the R/C channels are separated by 10 kHz from the RCC frequencies. In addition, the larger number of such channels would permit greater separation from an interfering signal, particularly in large industrial plants where many cranes must be operated simultaneously. Robinson contends that operation of industrial remote control devices will not significantly increase the signal level at any given model craft operating site. Further, Robinson also filed a request for waiver of Section 95.207 of the Commission's Rules, 47 C.F.R. § 95.207, so that remote control of industrial cranes using R/C Radio Service model surface craft or model aircraft channels could continue.

III. DISCUSSION

8. The issue presented here is whether the R/C Radio Service channels specifically allocated for the remote control of model surface craft also should be authorized for the remote control of industrial cranes. We are not persuaded by Robinson's arguments that such use should be permitted. The R/C Radio Service is one of the Personal Radio Services. One objective of the Personal Radio Ser-

vices is to satisy certain short-distance, personal communication needs of the general public. Using R/C channels, members of the public can enjoy the recreational activity of remotely controlling model vehicles without the necessity of obtaining a license for the low-power transmitter used in such systems. Specific channels are assigned for model surface craft. Other channels are assigned for model aircraft because of the incompatibility between the operation of model surface craft and model aircraft in the same area. Further, loss of control of a speeding model aircraft or surface craft could cause damage to persons and property. Ideally, non-personal communications needs should be satisfied by communications alternatives other than in the Personal Radio Services.

9. The Manufacturers Radio Service and the Business Radio Service, Part 90 of the Commission's Rules, 47 C.F.R. Part 90, provide for the remote control of industrial cranes. The license eligibility provisions in these two services are sufficiently broad to permit any entity that would be using an industrial crane to be issued a license in one or the other of those services. [3] Robinson has not provided any support for its argument that there are insufficent channels available in these services for the remote control of industrial cranes. On the contrary, there are numerous channels available for remote control operations.

10. It may seem, at first blush, that there is an abundance of channels which have been allocated only for recreational use -- 30 channels for model surface craft operation, and 50 channels for model aircraft operation. The fact of the matter is, however, that not all of the model surface craft and aircraft channels are useable at any given location. The use of these channels for remote control of models is available only on a secondary basis to all other fixed and mobile operations in the 72-76 MHz band. Such operations must not cause interference to common carrier domestic public stations, to remote control of industrial equipment operating in the 72-76 MHz band, or to the reception of television channels 4 (66-72 MHz) or 5 (76-82 MHz). *See* 47 C.F.R. § 2.106 NG Footnote 56.

11. If there is RCC interference to private land mobile service channels, as Robinson alleges, we note that there are ten 72-76 MHz channels available in the Manufacturers Radio Service for mobile operations only (including remote control) that could be used by Robinson's customers.[4] Those channels are not available for RCC operations.

12. Robinson's final argument, that it was unaware until recently that the R/C channels were restricted to recreational use, is not persuasive. The allocation of the channels in the R/C Radio Service for the remote control of model craft was the subject of a notice and comment rule making proceeding. Consequently, by virtue of the publication of the rule amendments in the Federal Register, Robinson had constructive notice of them and they are binding on Robinson.[5]

IV. CONCLUSION

13. Robinson Engineering Company's petition for a shared use of the R/C Radio Service model surface craft channels by industrial cranes does not warrant action by the full Commission. *See* 47 C.F.R. § 1.401(e). Further, Robinson has not shown good cause to support its request for a permanent waiver of Section 95.207.

14. IT IS THEREFORE ORDERED, pursuant to Sections 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.401(e), that Robinson's petition to amend Part 95, Subpart C, IS DENIED.

15. IT IS FURTHER ORDERED that Robinson's request for permanent waiver of Section 95.207 so that remote control of industrial cranes using model surface craft or model aircraft channels in the R/C Radio Service may continue IS DENIED.

16. Nothwithstanding the foregoing denial of a permanent waiver, any Robinson customer currently engaging in bridge crane operations on an R/C Radio Service model surface craft or model aircraft channel may continue to operate on that channel for a temporary period ending June 30, 1993, provided that such operation causes no harmful interference to the remote control of model surface craft or model aircraft. Further, Robinson must notify all its customers that operate on R/C channels, and each customer must notify the Special Services Division, Private Radio Bureau, on or before March 2, 1990, if it intends to avail itself of this TEMPORARY WAIVER of Section 95.207, 47 C.F.R. § 97.207, and TEMPORARY AUTHORIZATION.

17. IT IS FURTHER ORDERED that this *Order*, except as otherwise provided herein, shall become effective upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

FOOTNOTES

[1] Robinson manufactures and sells industrial radio remote control devices and systems, primarily for use with cranes used for moving, shifting, and raising materials and objects in factory settings.

[2] Section 95.207(a), 47 C.F.R. § 95.207(a), provides 30 channels between 75 MHz and 76 MHz that may be used only for remote control of a model surface craft device (any small imitation of a boat, car, or vehicle, except an aircraft). It also provides 50 channels between 72 MHz and 73 MHz that may be used only for remote control of a model aircraft and six channels between 26.99 MHz and 27.26 MHz for remote control of any object or apparatus, except an R/C transmitter.

[3] *See* 47 C.F.R. §§ 90.75(a) and 90.79(a).

[4] An additional twenty channels are also available in the Manufacturers Radio Service on a shared basis with fixed stations in other services.

[5] Report and Order, General Docket 82-181, 47 Fed. Reg. 51875 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-88-005

For such authority as may be necessary in order for it to participate in a program for the construction of high power INTELSAT VII series communications satellites and procurement of appropriate launch vehicles to be used as part of the INTELSAT global satellite system

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 11, 1990; Released: February 9, 1990

By The Commission:

1. The Communications Satellite Corporation (Comsat) has filed an application seeking authority pursuant to Section 201(c) of the Communications Satellite Act of 1962, as amended, 47 U.S.C.§721(c) and Sections 214, 308 and 319 of the Communications Act of 1934, as amended 47 U.S.C.§§ 214, 308 and 319, to participate in a program for the procurement and construction by the International Telecommunications Satellite Organization (INTELSAT) of up to five high capacity INTELSAT VII series communications satellites to be used commencing in 1992/93 as part of the INTELSAT global system, and for the procurement of appropriate launch vehicles for these satellites.

2. The application was filed on July 12, 1988 and was supplemented on August 31, 1988, September 9, 1988 and May 2, 1989. Pan American Satellite (PAS) filed a petition to deny the application.[1] Comments were filed by GTE Spacenet Corporation (GTE), MCI Telecommunications Corporation (MCI) and American Telephone and Telegraph Company (AT&T). Comsat filed an opposition to PAS' petition to deny. PAS filed a reply to Comsat's opposition.[2] Comsat filed a further opposition to which PAS further replied. Comsat filed a letter in response to PAS' further reply. PAS also filed comments in response to Comsat's May 2, 1989 further supplement to the application and Comsat filed a reply to PAS' comments.

BACKGROUND

3. On October 1, 1987, INTELSAT released a Request for Proposals (RFP) for the design and construction of the INTELSAT VII series satellites. The RFP requested bids covering initial procurement with options for up to nine spacecraft by 1994. The underlying premise of the RFP was that the INTELSAT VII spacecraft would rely primarily on proven "off the shelf" technology.

4. In February 1988, INTELSAT received bids from Ford Aerospace Company (Ford), General Electric Technical Services Company, Hughes Aircraft Company and The Matra Group. After reviewing various aspects of the proposals, the Director General recommended that INTELSAT select Ford for negotiation of a formal contract to construct the INTELSAT VII spacecraft. At its June 1988 meeting, the INTELSAT Board of Governors approved the Director General's recommendation and authorized him to enter into negotiations with Ford for an initial purchase of from three to five spacecraft.

5. Comsat filed its application to participate in a program for the procurement of INTELSAT VII satellites on July 12, 1988. Comsat supplemented the application on August 31, 1988 to provide information on baseline prices, baseline and optional design characteristics and updated traffic projections. Comsat noted in the supplement that no less than four spacecraft would be required to maintain the global system and that it would review in a later supplement the Director General's recommendation to include a fifth spacecraft as part of the initial buy. On September 9, 1988 Comsat filed a further supplement to its application setting forth the public interest considerations in favor of five satellites based on operational need and cost savings. Additional information was also provided on the optional features that would likely be included on the spacecraft. Finally, Comsat additionally supplemented its application on May 2, 1989 to provide updated traffic information based on the 1989 INTELSAT Global Traffic Meeting (GTM).

6. At its meeting held September 8-14, 1988 the INTELSAT Board of Governors decided to authorize the Director General to award on or before September 30, 1988 the contract to Ford for the delivery of five INTELSAT VII spacecraft, with the first spacecraft to be delivered no later than November 1, 1991. The remainder of the spacecraft would be delivered at five month intervals. The Board of Governors stated that a decision as to the launch vehicle would be made at its December 1988 meeting. At its December 1988 meeting, the Board of Governors decided to procure three Ariane and two U.S. launch vehicles. The Director General awarded the contract to Ford on October 4, 1988.

THE APPLICATION

7. Comsat's application to participate in the construction of up to five INTELSAT VII spacecraft is based on INTELSAT's nominal deployment plan which serves as the baseline configuration for planning purposes for procurement decisions. The INTELSAT VII satellites will be part of the nominal 9+1(+3) configuration which Comsat believes represents the plan upon which INTELSAT procurement decisions can be based throughout the 1990s. The nominal 9+1(+3) configuration consists of nine operating satellites, one dedicated system spare and three satellites in inclined orbit residual roles.[3] INTELSAT currently maintains satellites in a total of eleven operational roles in three ocean regions; six in the Atlantic Ocean Region (AOR), three in the Indian Ocean Region (IOR) and two in the Pacific Ocean Region (POR). Comsat states that eight of the eleven satellites filling operational roles will reach the end of their nomi-

nal orbital design lives prior to 1991. Seven of these satellites will be replaced by two INTELSAT VA satellites and five INTELSAT VI series satellites now on order and scheduled for launch between 1989 and 1991.[4] One of the current operational roles --66^0 E in the IOR--will be discontinued following the deployment of two INTELSAT VI satellites in the IOR in the 1990/91 timeframe, resulting in a 9+1(+3) baseline configuration.

8. Initial INTELSAT VII deployment is targeted for 1992/93 in order to replace two INTELSAT VA satellites in the POR which will reach the end of design life within that time frame. Comsat states that the replacement of these satellites will ensure continuity of service for the two POR operational roles at 174^{0}E and 177^0 E and will enable INTELSAT to meet forecasted demand into the next century. Although Comsat states that the immediate deployment of INTELSAT VII satellites is to replace two INTELSAT VA satellites in the POR, Comsat notes that the procurement of at least four INTELSAT VII satellites is necessary in order to provide contingency spacecraft to back-up eight critical satellites in the event of launch failure.[5] Comsat notes that the INTELSAT VII series is designed in such a way that the satellites will be suitable for use in other ocean regions without undertaking a major redesign of the satellite. Comsat states that, assuming no launch failures in the next eight launches, INTELSAT plans to deploy two of the contingency in the AOR to replace satellites that will reach the end of their design life in the 1993/94 and 1995/96 time frames. The fifth INTELSAT VII that INTELSAT has decided to procure as part of the initial buy would be deployed as a replacement satellite at the 359^{0}E location, which Comsat states is required to provide unique connectivity essential to U.S. national security and to meet important U.S. carrier requirements that would otherwise go unserved. In addition, Comsat states that the INTELSAT VII program will enable INTELSAT to procure additional satellites to protect against the contingency of one or more launch failures in the near term launches of the remaining INTELSAT VA and VI satellites as well as subsequent launches of the INTELSAT VII spacecraft.

9. Comsat states that the INTELSAT VII concept is predicated upon the use of proven advances in technology to allow migration to a system using smaller earth stations and smaller spacecraft which would be capable of providing capacity on the order of that available on the INTELSAT VI satellites.[6] The baseline INTELSAT VII design is for a high-connectivity, hybrid spacecraft which would make available the benefits of higher effective isotropic radiated power (e.i.r.p.) satellites intended to operate with smaller earth stations, with both C and K-band capacity optimized for the POR. Comsat asserts that the INTELSAT VII spacecraft will be the most powerful satellite ever procured by INTELSAT, with approximately 50% more prime power than the INTELSAT VI series.[7] According to Comsat, the higher e.i.r.p. provided on the INTELSAT VII satellites will permit smaller-sized C-band antennas to operate with the satellites and will serve the increasing demand for other small earth antennas in the POR while reducing earth station costs.

10. In the August 30, 1988 supplement to its application, Comsat provided information on the cost of the INTELSAT VII program based on the number of satellites procured.[8] The information shows the negotiated prices for buys of three, four and five spacecraft on a firm-fixed price basis, which prices are set forth below.

Cost/Price ($M)[9],	Number of Spacecraft		
	three	four	five
1. Non-Recurring Cost	76	76	76
2. Recurring Cost	174	232	284
3. In-orbit Performance Incentives	83	102	120
Total Price	333	410	480

Comsat also included a schedule of optional prices for additional satellites that has been negotiated.[10] The schedule sets forth option prices for the procurement of from 1 to 7 optional satellites based on the elapsed time between the October 1988 contract date and the decision to procure optional satellites. The negotiated option schedule indicates that the price of additional satellites will vary according to whether the decision is made within the following time periods from the October 1988 contract date: 0-6 months, 7-18 months, 19-30 months, 31-42 months, 43-54 months and 55-66 months. Comsat notes that if options are ordered in such a way that the production cycle is not broken, an additional discount would be available.

11. In its initial application, Comsat provided traffic projections generated at the 1987 INTELSAT Global Traffic Meeting (GTM) which are based on short term traffic estimates derived from data submitted by Signatories and non-member users of the system. In the May 2, 1989 further supplement to its application, Comsat provided updated traffic projections generated at the 1988 GTM as well as actual traffic totals for year-end 1988. The traffic figures submitted at the GTM have been converted into utilization figures for the purpose of this application. Comsat refers to the traffic projection generated at the GTM as the "User Forecast". Comsat also provided projections set out in Director General (DG) Forecast which is based on the User Forecast, but is subject to certain discounting which the Director General believes is appropriate.[11]

12. Comsat states that while robust traffic growth is expected to continue in the INTELSAT system throughout the 1990s, actual bandwidth resources needed to accommodate this traffic growth are expected to remain relatively stable from 1993 onward as a result of the efficiency benefits of digital technology. Comsat states that over the next twelve years, the INTELSAT system will be relying increasingly on powerful digital voice processing techniques that will enable multiple voice-grade circuits to be carried on a single "bearer" circuit, thereby reducing the amount of bandwidth resources required to accommodate conventional services traffic demand. Comsat notes that the immediate effect of this trend coupled with the availability of additional bandwidth from the INTELSAT VI satellites will be a reduction in the number of conventional services half-circuits carried on the system.

13. Although Comsat concedes that the DG Forecast has proven more reliable than the generally higher User Forecast, it observes that the DG Forecast contained several assumptions which have already proven to substantially overstate the initial implementation of digital conversion and the use of circuit multiplication equip-

ment, resulting in the understatement of future conventional services traffic requirements over the next three to five year period.[12] Comsat also believes that the DG Forecast underestimates the demand for Category B services during the 1990s in light of the expressions of interest it has received from customers and other Signatories. Finally, with respect to all services, Comsat believes that the DG Forecast underestimated the demand for capacity during 1987 and 1988, resulting in the starting point for his post-1988 projections being unrealistically low.

14. In the most recent traffic data filed by Comsat, separate totals for both Category A and Category B services are provided on a system-wide basis. According to Comsat, the supplemental information provided in its May 2, 1989 filing clearly supports its earlier conclusions that the 1987 DG Forecast was too conservative. Specifically, Comsat notes that for Category A services the 1988 DG Forecast projects system-wide traffic levels of 96,372 bearer half-circuits at the end of 1989, whereas the 1987 DG Forecast predicted only 56,428 bearer half-circuits at the end of 1989. Comsat notes that actual year-end totals for Category A services were 92,428 bearer half-circuits in 1987 and 107,538 bearer half-circuits in 1988. By year 2000, the 1987 DG Forecast predicts a total of 103,276 bearer half-circuits whereas the 1988 DG Forecast predicts a total of 118,494 bearer half-circuits in operation.

15. Comsat also states that projected growth for Category B services is high, and with the exception of occasional use video, is higher in the 1988 DG Forecast than the 1987 DG Forecast. For example, Comsat notes that according to 1988 projections, international video leases will increase by 43% from 50.1 to 72.0 36 MHz equivalent channels between 1989 and 1993, and IBS channels will increase by 58% from 12,428 to 19,694 64 kbps equivalent channels. Comsat contrasts these projections with the 1987 DG Forecast which predicted growth of 36% for international video leases and 38% for IBS over the same time period. With respect to occasional use video service, Comsat notes that the 1988 DG Forecast remains about the same as the 1987 DG Forecast, with an increase of approximately 26% projected between 1989 and 1993.

16. Comsat also demonstrates that the same trend applies for projected growth of domestic sales and leases. The 1987 DG Forecast projected an increase to 150 36 MHz equivalent units in 1993, whereas the 1988 forecast projects 179 36 MHz equivalent units. Comsat notes that approximately 45% of this capacity is devoted to leases which, under Articles III(b)(i) and III(b)(ii) of the INTELSAT Agreement, are accorded the same priority as international services. To the extent that the above projections include PDS, Comsat points to the December 1988 decision by the INTELSAT Board of Governors asking the DG to reexamine the merits of transponder sales for PDS and to propose steps to discourage continued sales. As a result of that action, Comsat believes that PDS on the INTELSAT VIIs will likely be offered only on a long-term lease basis which will increase the amount of domestic service provided pursuant to Articles III(b)(i) and III(b)(ii) of the INTELSAT Agreement. Finally, Comsat points to a new service classification offering unrestricted leases of 36 MHz transponder capacity for regional use (international) services as resulting in more efficient use of space segment services.

17. Based on the most recent information available, Comsat concludes that traffic levels on the INTELSAT system in the 1990s will be significantly higher than the level projected in its initial application. Comsat notes that the more recently projected higher traffic levels will also lead to utilization levels greater than it initially projected. In its May 2, 1989 supplement, Comsat provided revised utilization levels on a system-wide and region-wide basis.[13] On a system-wide basis, Comsat notes that 1988 GTM traffic data translates into utilization rates between 71% and 84% from 1989 through 1993, with even higher rates projected for the long term. Even with the successful deployment of the INTELSAT VIs and VIIs, Comsat indicates that utilization will rise to approximately 100% by the year 2000.

18. With respect to region-wide utilization, Comsat provided in its initial application both DG and User projections of utilization levels of INTELSAT space segment capacity for each ocean region based on the 1987 GTM. In its May 2, 1989 further supplement to its application, Comsat provided only updated DG utilization forecasts based on the 1988 GTM. The DG forecasts of utilization based on the 1988 GTM were substantially higher than the DG forecasts submitted in Comsat's initial application. In the POR, Comsat's initial application projected that the utilization level would be between 58%(DG) and 76%(User) at the time when the INTELSAT VA (F-10) and (F-11) satellites in the POR would be reaching the end of design life in 1993.[14] Even with the increase of 14% total bandwidth resulting from the deployment of the two INTELSAT VII satellites, Comsat indicated that by the year 2000 utilization levels will have risen to 78% (DG) and 107% (User). The 1988 DG forecast projects approximately 60% utilization in the POR by 1993 and in excess of 100% by the year 2000. In the IOR, Comsat initially stated that by 1993 utilization on the two INTELSAT VI satellites would be between 54% (DG) and 72% (User) and between 79% (DG) and 106% (User) by year 2000.[15] The 1988 DG forecast now projects 66% utilization in the IOR by 1993 and 91% by the year 2000. With respect to the AOR, Comsat initially noted that overall utilization is projected to be between 58% (DG) and 79% (User) in 1993. Assuming the successful deployment of three INTELSAT VII satellites at the 307^0E, 342^0E and 359^0E locations as planned, Comsat indicated that AOR utilization levels would be between 73% (DG) and 112% (User) by the year 2000. The 1988 DG forecast now projects 83% utilization in the AOR in 1993 and in excess of 100% by the year 2000, assuming no launch failures.

POSITIONS OF THE PARTIES

19. PAS opposes Comsat's application to participate in the purchase of INTELSAT VII satellites, with the exception of the two INTELSAT VII satellites that would replace two INTELSAT VA satellites in the POR which will reach the end of design life in the 1992/93 time frame. PAS contends that Comsat has not adequately justified the need for four or five satellites at this time based on traffic projections. PAS argues that past experience has proven INTELSAT's traffic projections to be significantly overstated. PAS does not believe that Comsat has justified participation in the procurement program which PAS contends is designed to provide significant levels of Planned Domestic Services (PDS).[16] PAS is concerned

that U.S. ratepayers will subsidize these domestic services even though the services will not benefit them. PAS also asserts that Comsat has failed to provide adequate cost information in support of its application. For example, PAS notes that Comsat has not examined the cost consequences of certain alternatives. First, PAS states that Comsat has failed to analyze the cost effects of making differing assumptions about the 9+1(+3) configuration.[17] Second, PAS states that Comsat has provided no information about the cost of PDS in this procurement. Unless such costs are set forth PAS argues, the Commission cannot determine the costs to U.S. ratepayers of a secondary service they will not use. With respect to Comsat's argument that it would be cheaper to procure all five satellites now rather than in a later procurement cycle, PAS observes that there might be even greater savings if the three additional INTELSAT VII satellites (two contingent and one at 359^{0}E) are not purchased at all.

20. In response to the concerns raised in PAS' petition to deny, Comsat maintains that there is a need for the procurement of five INTELSAT VII satellites at this time based on the need to replace two INTELSAT VA satellites in the POR that will reach the end of design life in the 1992/1993 time frame, to protect against launch failures and to replace satellites in the AOR that will reach the end of their design life in the 1993/1995 time frame. Citing four launch failures in the last twenty-six launches of INTELSAT satellites, Comsat states that there is a need to procure two contingent satellites to ensure against launch failure of INTELSAT VI as well as the two POR INTELSAT VII satellites.[18] However, Comsat notes that the procurement of only four satellites at this time would still leave INTELSAT in the position of having to procure replacements for three satellites in the AOR, including the INTELSAT VA (F-12) which will be deployed in the 359^0 location and will reach end of design life in 1993. Thus, Comsat asserts that sound business and operational reasons justify the procurement of a fifth satellite at this time. Should there be no launch failures, Comsat notes that INTELSAT plans to deploy the two contingent satellites and the fifth satellite in the AOR at orbital locations where existing satellites will reach the end of design life in the 1993/1995 time frame.

21. With respect to PAS' arguments on PDS, Comsat states that the need for INTELSAT VII satellites is based solely on international requirements. Comsat notes that of the orbital positions designated for deployment of INTELSAT VII satellites, only the 359^{0}E location involves a significant amount of PDS. However, Comsat observes that the 359^{0}E orbital location is important from a national defense standpoint as well as providing connectivity desired by carriers. With respect to the costs of PDS, Comsat states that while the pricing of PDS on the INTELSAT VIIs is an issue to be addressed in the future, it is "firmly committed to the principle that the international service ratepayers do not subsidize domestic service users."[19] Comsat also provided information to demonstrate that domestic services lower the cost to the U.S. ratepayer by enhancing economies of scale, especially the ability to spread both fixed and variable cost over a wider base.

22. GTE Spacenet does not oppose Comsat's participation in the construction of the INTELSAT VII series satellites. However, GTE Spacenet does oppose any contention that INTELSAT space segment can be routinely used to provide U.S. domestic service, including off-shore U.S. domestic service, where U.S. domestic satellite operators are authorized, capable and willing to provide such services. According to GTE Spacenet, any use of INTELSAT space segment to provide U.S. domestic service would contravene Commission policy regarding the use of international facilities within the U.S. domestic marketplace. In addition, GTE Spacenet asserts that Article III(b) of the INTELSAT Agreement only clothes INTELSAT with authority to provide U.S. domestic service links in special exceptional cases. Finally, GTE Spacenet maintains that the existence of competition from fiber optic cables and separate satellite systems does not justify INTELSAT's entry into the U.S. domestic market. GTE Spacenet notes that INTELSAT is not subject to the same rules and regulations as U.S. domestic satellite operators. GTE Spacenet believes that to permit Comsat and INTELSAT to provide U.S. domestic services without adhering to the standards applicable to U.S. domestic satellite operators would result in a competitive advantage to Comsat and could pose significant harm to the U.S. domestic satellite industry.

23. MCI supports Comsat's participation in the construction of the INTELSAT VII series satellites. MCI notes that it relies on the timely availability of INTELSAT facilities. With respect to the location of an INTELSAT VII satellite at the 359^0 E, MCI states that it has engaged in business planning in reliance on the availability of access to that satellite from its recently acquired Andover, Maine earth station. MCI avers that denial of access to that satellite would substantially impair its ability to provide international service, particularly to nations in the IOR. In addition, MCI notes that denial of access to a satellite located at the 359^0 E orbital location would result in inefficient use of its Andover earth station, which MCI maintains would be inconsistent with the Commission's efforts to foster individual ownership of international earth stations.

24. In its comments, AT&T emphasizes the importance of maintaining an INTELSAT satellite at the 359^0 E orbital location. AT&T notes that it relies on the 359^0 E satellite to provide direct service between the U.S. and India, Pakistan and Diego Garcia. AT&T states that its new earth station at Coram, New York is specifically designed to operate with the 359^0 E satellite to ensure direct connectivity with the above points. AT&T notes that its correspondent in India is currently building a new antenna to operate with this satellite. AT&T also states that it has engaged in joint facility planning with its other correspondents on the Indian subcontinent in reliance on the continued availability of a satellite located at the 359^0 E location.

DISCUSSION

25. Comsat's application presents two questions for our consideration: whether there is a need for an INTELSAT VII satellite series and, if so, how many satellites should be procured as part of the initial purchase. In considering these issues, we analyze such factors as: (1) the need to replace INTELSAT VA satellites in the POR; (2) the need for contingency satellites in case of launch failure; (3) INTELSAT's nominal deployment plan, including the importance of the specific roles for which INTELSAT VII satellites are tentatively planned for deployment, (4) traffic projections; and (5) the use of INTELSAT VII satellites for PDS. As demonstrated herein, we conclude that an

INTELSAT VII satellite series is required in view of the need to replace two INTELSAT VA satellites in the POR which will reach the end of design life in the 1992/93 time frame. We also conclude that operational as well as economic considerations warrant procurement of five satellites as part of the initial purchase.

A. The Need for INTELSAT VII Series

26. INTELSAT's procurement of additional satellites throughout the 1990's is based on a 9+1(+3) nominal configuration. INTELSAT currently maintains eleven operational roles in three ocean regions; six in the AOR, three in the IOR and two in the POR. INTELSAT plans to discontinue one operational role in the IOR (66^0 E) following the deployment of two INTELSAT VI satellites in the IOR in the 1990/91 time frame. Thus, the 9+1(+3) nominal configuration upon which INTELSAT satellite procurement is based represents a departure from the current configuration which includes one additional operational role.

1. The need for two INTELSAT VIIs in the POR

27. Comsat notes that the deployment of two INTELSAT VII satellites at the 174^0 E and 177^0 E operational roles will ensure continuity of services at these locations and should enable INTELSAT to meet forecasted demand into the next century. In addition to satisfying current service requirements and accommodating growth, Comsat states that maintaining a two satellite configuration in the POR is necessary for diversity, connectivity and redundancy reasons. No party disputes the need for these two INTELSAT VII satellites in the POR during the 1992/93 time frame.[20] When the INTELSAT VA-10 and VA-11 reach the end of design life, INTELSAT will have no in-orbit satellites that can serve as replacements in the POR without purchasing additional satellites. We therefore find that continuity of service in the POR requires the procurement of two replacement satellites to be used commencing in the 1992/93 time frame.

28. We further find that the sizing of the INTELSAT VII satellites is reasonable to accommodate traffic demand in the POR throughout the design life of these satellites.[21] Comsat notes that INTELSAT VII satellites are sized in such a way as to reach saturation late in their expected lifetimes. The satellite utilization data submitted by Comsat shows that by year 2000 utilization of the two INTELSAT VIIs in the POR will be 73.7% and 83.3% according to the more conservative DG forecast.[22] This spacecraft design will enable INTELSAT to meet projected demand into the next century.

2. The need for contingent INTELSAT VII satellites

29. INTELSAT plans to acquire three additional INTELSAT VII satellites (1) to protect against launch failures of currently planned satellites, and (2) to the extent not needed to cover launch failures, to fulfill operational roles in the AOR as replacement satellites.

30. *Launch failure contingency.* In its filings, Comsat states that the purchase of two spares to protect against launch failures of one INTELSAT VA, five INTELSAT VI and two INTELSAT VII satellites is reasonable in light of four failures in the last 26 INTELSAT launches.[23] Comsat, notes that the four failures in the last 26 launches translate into a 15% probability of failure for any given launch. Using the 15% probability, Comsat states that the likelihood that all of the next 8 launches will be successful is less than 28%. Thus, Comsat states that there is more than a 72% chance of at least one launch failure. The likelihood of two or more launch failures is approximately 34%.[24]

31. PAS disagrees that there is a need for two INTELSAT VII satellites as backups for launches of the two INTELSAT VII POR satellites as well as the INTELSAT VI satellites. PAS questions why the two INTELSAT VII POR satellites cannot be used to provide sufficient backup for the launches of the INTELSAT VI satellites. According to PAS, this approach would permit later purchase of additional INTELSAT VII satellites if there are problems with the INTELSAT VI launches and would be significantly less costly in terms of current expenditures. PAS also notes that its approach would give INTELSAT greater control over its space segment capacity and would lessen the need to sell off "excess" capacity if greater than expected launch successes occur.

32. Under the circumstances presented,[25] we conclude that it is reasonable for INTELSAT to procure two additional INTELSAT VII satellites to guard against launch failures of the four INTELSAT VI satellites that remain to be launched and the two INTELSAT VII satellites to be deployed in the POR. We recognize that advancements in satellite launch technology permit the types of successes experienced initially with the INTELSAT V series in which the first eight launches were successful. However, in light of the recent history of launch failures, we are inclined to agree with Comsat that a more prudent approach is warranted. While there have been only four launch failures in the last twenty-eight launches, two of those launch failures occurred in the last nine launches. Based on these developments, we believe that it is reasonable for INTELSAT to procure as part of the initial buy two contingent INTELSAT VII satellites. We disagree with PAS' suggested "step-by-step" approach which would first use the two INTELSAT VII satellites to protect against launch failures of the INTELSAT VI satellites. As noted previously, there is a clear need for two INTELSAT VII POR satellites during the 1992/93 time frame. If these satellites are used as the only insurance against launch failures of the INTELSAT VI satellites, any launch failure of an INTELSAT VI satellite would deprive the POR of replacement satellites. Assuming that all of the launches of INTELSAT VI satellites are successful, the time would eventually come when only the two INTELSAT VII POR satellites remained to be launched. Under either scenario, additional satellites would be required to ensure that two INTELSAT VII satellites are successfully deployed in the POR.

33. Additionally, other factors are relevant in determining the financial consequences of purchasing additional satellites. We agree with Comsat that INTELSAT must consider: 1) whether the satellites are procured as part of the initial purchase and, if not, 2) the length of time between the contract date and the order date of the additional satellites. The cost information submitted by Comsat indicates that the cost of procuring four INTELSAT VII satellites as part of the initial purchase would be $410 million. Under PAS' approach, INTELSAT would only buy two INTELSAT VII satellites initially and wait to see if all of the INTELSAT VI satellites are successfully launched before purchasing additional INTELSAT VIIs. However, assuming that the last

INTELSAT VI satellite is successfully launched in January 1991 and that two additional INTELSAT VIIs are procured at that time to replace spacecraft in the AOR, the total for the four INTELSAT VII satellites would be greater than if the additional satellites were part of the initial buy.[26] In light of these circumstances, as well as the need for satellites to guard against launch failure, we conclude that it is reasonable for INTELSAT to include two contingent satellites as part of the initial INTELSAT VII procurement.

34. *Fulfillment of AOR operational needs.* In the event that no launch failures occur, INTELSAT plans to deploy the two spare satellites and a fifth INTELSAT VII satellite in the AOR where traffic requirements are double those for the IOR and POR combined. INTELSAT's current plans are to deploy these three satellites at the 342^{0}E, 307^{0}E and 359^{0}E orbital locations.

35. PAS' challenge to Comsat's application in part focuses on the operational roles proposed for these satellites, assuming no launch failures. PAS states that Comsat fails to justify the INTELSAT 9+1(+3) configuration. PAS notes that Comsat has not shown that it has explored how over-estimating in forecasts might affect INTELSAT procurement and whether current capacity may be better utilized in lieu of constructing new capacity. With respect to the AOR, PAS maintains that if an INTELSAT satellite is to be placed at the 359^0 E location, where a significant amount of capacity would be available for PDS, Comsat should quantify what it means by "significant". PAS also argues that Comsat has failed to explore why an INTELSAT VII is needed at 359^{0}E and whether a smaller satellite would not suffice.

36. We disagree with PAS that Comsat fails to justify the AOR configuration. The satellite configuration projected for the AOR can be divided into three categories: (1) three mid-ocean region high connectivity/trunking locations; (2) two rim-role locations with unique coverage/connectivity features; and (3) one in-orbit system spare. Comsat asserts that maintenance of all six locations can be justified on the basis of meeting future international requirements of the global system. We agree. The three mid-ocean roles (one Primary and two Major Path satellites) are necessary to provide basic connectivity along with major trunking capacity to serve the AOR. The AOR primary (at 335.5^{0}E) is a high connectivity satellite that provides services to a total of 80 antennas in 69 countries throughout the region. Larger traffic streams are accommodated on the two Major Path satellites at 325.5^{0}E and 342^{0}E which also provide additional West-West and East-East connectivity, respectively. As Comsat notes, these three satellites are collectively required to accommodate the bulk of the high density traffic in the AOR. Additionally, the 342^{0}E Major Path satellite is located to the East of the Primary and provides additional East-East connectivity. The other Major Path satellite at 325.5^{0}E is located to the West of the AOR Primary satellite and provides additional West-West connectivity.

37. With respect to the two rim locations (307^0 E and 359^0 E) more specialized requirements are involved. Comsat observes that the 307^0 E satellite is important because it is the only satellite to provide full CONUS coverage of the U.S. and serves as the principal AOR satellite to provide IBS, for which the full CONUS coverage is well suited. The full CONUS capabilities of this satellite allow direct C-band and K-band trans-Atlantic links to and from the entire continental U.S. In recent years, there has been a proliferation of requests by U.S. carriers to own and operate their own earth stations for the provision of IBS. These requests have come from all parts of the continental U.S. and for the most part request service to locations served by INTELSAT AOR satellies. Comsat notes that the 307^0 E satellite is accessed by over thirty IBS earth stations in the United States and states that INTELSAT IBS capacity is virtually saturated. In order to fully realize the goals envisioned by our *Earth Station Ownership* decision, which opened up earth station ownership to carriers outside of the Earth Station Ownership Committee (ESOC) consortium,[27] it is essential that one satellite having full CONUS coverage provide a direct link at both C-band and K-band. Most of the IBS earth stations authorized have been constructed specifically to operate with the INTELSAT satellite located at the 307^{0}E orbital position. This is particularly important in the case of IBS earth stations constructed on the west coast of the U.S. which can only "see" the 307^{0}E satellite.[28]

38. The 359^{0}E satellite is the only orbital location that provides direct satellite links from the United States to Diego Garcia, much of the Middle East and the Indian subcontinent. This connectivity is important for U.S. defense interests (DoD requirements for service to Diego Garcia) and for U.S. carriers. Two carriers, AT&T and MCI, have attested to the importance of this orbital location for national security and connectivity reasons. AT&T and MCI state that important planning decisions have been made with foreign correspondents based on the continuation of the 359^{0}E orbital location. PAS does not dispute the need for a satellite at this location based on considerations of connectivity and national security. Rather, PAS questions whether a smaller satellite might suffice at this location in light of Comsat's indication that a significant amount of PDS will be carried over this satellite. PAS also questions whether DoD's needs could be met by using one of the inclined orbit satellites.[29]

39. We conclude that INTELSAT's plans to deploy the three additional INTELSAT VIIs at the 307^{0}E, 359^{0}E and 342^{0}E orbital locations in the AOR in the event that no launch failures occur is reasonable. The continued use of these three orbital locations is justified by overall INTELSAT traffic requirements and connectivity considerations. A satellite at each of these locations clearly serves U.S. needs as well as those of other INTELSAT members. Each orbital location will require replacement satellites during the 1993 -1995 timeframe.

40. We are unpersuaded by PAS arguments against procurement of a fifth INTELSAT VII to be located at 359^0 E. First, as discussed above, the design for the INTELSAT VII series is based on the need to replace two POR INTELSAT VA satellites that will be reaching the end of design life in the 1992/93 time frame. PAS does not question the sizing of these satellites in order to accommodate POR needs for the remainder of this century. Although, as PAS suggests, a satellite could be specifically designed for the 359^{0}E location to precisely meet the traffic mix and volume projected for that location, Comsat contends that such a satellite would not be lower in cost than a fifth INTELSAT VII. Comsat states that the complexities of designing and building a dedicated satellite would outweigh the economies resulting from the purchase of multiple satellites from the same vendor. The cost information submitted by Comsat clearly demonstrates that the purchase of multiple satellites based on a

common design results in a lower per satellite cost for each additional satellite purchased.[30] Thus, it is questionable whether PAS' suggested approach of building a specific satellite for the 359°E orbital location would result in lower costs. Second, building a dedicated satellite tailored to the specific needs of the 359°E location would take away INTELSAT's flexibility to use that satellite in other orbital locations, which is a standard INTELSAT practice to maintain system flexibility. Moreover, building a smaller satellite for a particular location could result in premature fill of the satellite should actual traffic exceed forecasted demand. This would be of particular significance in the case of the 359°E location where U.S. national security interests are involved. Finally, given the importance of this orbital location to U.S. carriers and to DoD, we conclude that these requirements should not be subject to the uncertainties associated with the use of an inclined orbit satellite. As Comsat notes, an inclined orbit satellite would not be feasible because the ever-increasing "drift" of these satellites, coupled with an already very low look angle, would make it impossible for U.S. earth stations to see the satellites within a few months following the cessation of North/South stationkeeping.[31] Thus, we conclude that there is a need for an INTELSAT VII satellite at the 359°E location, notwithstanding PAS' objection that a significant amount of PDS may be carried over the satellite. We further conclude that, in light of the clear need for the continued operation of a satellite at this location, the purchase of this satellite as part of the initial buy, rather than as an option, is a reasonable course of action by INTELSAT.[32]

4. Traffic Projections

41. PAS points out that Commission authorization of the INTELSAT VI series satellites was based on the projected saturation of INTELSAT VA AOR satellites. PAS observes that subsequent to our authorization of the INTELSAT VI series, it became clear that INTELSAT's traffic projections had been substantially overstated. Building on this example, PAS questions the need for four or five new satellites at this time in light of traffic projections which PAS characterizes as consistently and significantly unreliable. PAS does not believe that there is incentive to forecast accurately given the present INTELSAT investment structure, the government ownership of PTT Signatories of INTELSAT and Comsat's rate of return on invested capital. PAS argues that Comsat has not shown why INTELSAT's future forecasts will be any more accurate than past forecasts.

42. We believe that the situation presented here is different from that in the procurement of INTELSAT VI satellites. Unlike the INTELSAT VIs, the need for INTELSAT VII satellites is not based primarily on the projected saturation of existing satellites. As noted above, INTELSAT VII satellites are required initially to replace two POR INTELSAT VA satellites that will reach the end of design life in the 1992/93 time frame. The need for the two contingent INTELSAT VII spare satellites is driven by considerations other than traffic levels. Should the launches of the four remaining INTELSAT VI satellites and the two POR INTELSAT VII satellites prove successful, the two contingency satellites would be deployed in the AOR to replace satellites that reach the end of their design life in the 1993/95 time frame. Even with respect to a fifth INTELSAT VII satellite, there is a need to replace a satellite that will reach the end of design life in 1993. Thus, the primary factor dictating the need for INTELSAT VII satellites is the requirement to replace existing satellites because of design life limitations and not projected saturation of capacity. Where design life limitations dictate replacement of a satellite, traffic projections could have a significant impact only with respect to the sizing of such replacement satellites. As noted above, we find the sizing of the INTELSAT VII series to be reasonable for all orbital locations scheduled for INTELSAT VII deployment.[33]

43. Assuming, *arguendo*, that the need for the INTELSAT VII satellites was based solely on projected increases in traffic demand, we find that the DG Forecast of traffic and utilization levels of INTELSAT satellites through the year 2000 supports procurement of five INTELSAT VII satellites. These forecasts are significant for two reasons. As discussed in greater detail below, the DG Forecast was developed to counterbalance overly-optimistic User Forecast. Second, the 1988 DG Forecast is significantly higher than the 1987 DG Forecast which was submitted with Comsat's initial application. The upward revision in utilization levels was prompted, in part, by higher than projected actual traffic levels. For Category A services, the 1987 DG Forecast projected approximately 68,000 bearer half-circuits by year-end 1988 and 56,428 bearer half-circuits by year-end 1989. Year-end actual totals for Category A services significantly exceed past projections with 92,428 bearer half-circuits in use at year-end 1987 and 107,538 bearer half-circuits in use at year-end 1988. With respect to Category B services, the 1987 DG Forecast projected approximately 7,000 IBS (64 kbps equivalent channels) in use by year-end 1988. Actual totals indicated that 7,280 IBS (64 kbps equivalent channels) were in operation at year-end 1988. There were 35.5 (36 MHz equivalent) International TV leases in use at year-end 1988, which was approximately the same as projected in the 1987 DG Forecast. These actual traffic figures have resulted in a higher 1988 DG Forecast which translates into higher projected utilization levels in all ocean regions. Utilization in the AOR is projected to be 83% in 1993 and in excess of 100% by 2000. In the POR, the DG Forecast projects 60% utilization in 1993 and in excess of 100% by 2000. In the IOR, the DG Forecast projects 93% utilization in 1989, 66% in 1993 after the launch of the INTELSAT VI satellites, and 91% by 2000.

44. PAS is concerned that past forecasting inaccuracies by INTELSAT could be repeated, resulting in excess capacity which could be used for PDS. PAS points out that INTELSAT erroneously assumed that the strong growth in demand in the late 1970s and early 1980s would continue at then-current rates. Based on this faulty assumption, PAS notes that INTELSAT made a commitment to procure a huge amount of capacity in the form of the INTELSAT VI satellites, only to be left with excess capacity when growth slowed. PAS believes that Comsat is now failing to consider the possibility that the present growth rate might not continue. Although INTELSAT traffic projections have in the past proved overstated, particularly with respect to the procurement of the INTELSAT VI satellites, several factors distinguish the current situation.

45. In the past, INTELSAT procurement decisions were based only on the User Forecast generated at the GTM. The User Forecast tended to overestimate traffic demand and, as in the case of the INTELSAT VI series, this forecast resulted in excess capacity when projected growth did not materialize. In contrast to that situation, we ob-

serve that for the first time in connection with the procurement of additional satellites, INTELSAT has provided two sets of projections in order to more accurately gauge the impact of various factors on traffic projections. The DG Forecast was established specifically to counterbalance the User Forecast generated at the GTM, which in the past proved to be overly optimistic. The wide disparity in the DG and User Forecasts for the AOR indicates that INTELSAT is concerned with the potential for overprojection and the reliance on overstated projections as a basis for major procurement decisions. Indeed, INTELSAT has to try to forecast accurately if it is to compete with optical fiber cables and other satellite systems that have come into existence recently. Given the speculative nature of traffic projections in general, and more specifically, INTELSAT's need to rely on the projections of its member countries, we believe that INTELSAT has made a reasonable effort in recent years to improve its forecasting.

46. The traffic information set forth above indicates that the DG Forecast has been more reliable than the User Forecast. In fact, based on actual traffic data for year-end 1987 and 1988, the DG Forecast has proved to be extremely conservative in the case of Category A services and extremely accurate with respect to Category B services. Under these circumstances, we do not agree with PAS that Comsat is failing to take into consideration possible declines in future growth. Indeed, the very decision by INTELSAT to establish a DG Forecast to counterbalance the User Forecast and to aid in procurement decisions is evidence of INTELSAT's concern that projected growth envisioned in the User Forecast might not materialize.

5. The Role of PDS in the Procurement of INTELSAT VII satellites

47. The use of INTELSAT satellites to provide PDS and the pricing of these services have been a source of continuing concern to the Commission as well as PAS. Our primary concern with PDS is how it is priced so that U.S. ratepayers will not be unduly burdened with these costs. Traditionally, the Commission, the Department of State and NTIA have jointly reviewed INTELSAT PDS pricing proposals and issued instructions to Comsat prior to INTELSAT Board of Governors meetings.[34]

48. In this proceeding, PAS has voiced its concern about PDS in the context of Comsat's participation in an INTELSAT VII procurement program. PAS views PDS as an increasingly larger component of all INTELSAT traffic. According to PAS, as of July 1985 non-U.S. domestic services via INTELSAT accounted for over 28% of INTELSAT capacity and is expected to increase to 37% by 1993, which will represent the largest category of use of the INTELSAT system in 1993. In light of these figures, and because none of the INTELSAT domestic capacity will be used by ratepayers, PAS argues that Comsat bears a heavy burden in justifying the construction of INTELSAT capacity for domestic use. PAS contrasts this situation with that involving the INTELSAT VA and VI satellites for which PDS was adopted as a means to "produce" additional revenues from surplus space segment capacity. Thus, PAS questions whether the "design and sizing" of the POR satellites are based entirely on meeting international requirements. PAS also argues that Article III (c) of the INTELSAT Agreement does not cover the construction of facilities intended for domestic use. PAS notes that Article III (c) applies only to "INTELSAT space segment established to meet the prime objective" which is defined as "the provision on a commercial basis, of space segment required for international telecommunications services". PAS views Article III(e) of the INTELSAT Agreement to be applicable to the instant request. Article III(e) is linked to Article V(e) which states that domestic space segment procured by INTELSAT pursuant to Article III(e) may be financed and owned by INTELSAT as part of the INTELSAT space segment upon the unanimous approval of all Signatories. Absent such unanimous approval, PAS notes that Article V(e) specifies that such facilities shall be financed and owned by those requesting them. PAS states that Comsat has not shown in its application that either of the aforementioned conditions have been satisfied.

49. PAS is concerned that INTELSAT is in a position to price PDS transponders significantly below cost. PAS also cites statements made by the Commission stating its concern that if INTELSAT funds are used to pay for the construction of domestic transponders "the rates paid by U.S. consumers for international services will subsidize domestic services of no particular use to U.S. consumers."[35] PAS also takes issue with Comsat's assertion that the planned inclusion of domestic services will bring about economies of scale and other efficiencies obtainable from the procurement of additional satellites and the ability to spread fixed costs over a wider base, thereby decreasing the per unit cost of all space segment services provided on the system. According to PAS, basic economic principles indicate that the existence of significant economies of scale will lead to monopoly or near-monopoly conditions. Even if there were economies of scale, PAS states that Comsat has not demonstrated how U.S. ratepayers would benefit since they cannot take advantage of low cost PDS. Although Comsat noted in its application that domestic services will be required to cover their full costs, PAS observes that Comsat has not indicated how such cost recovery will occur and that no consensus has been reached to date.

50. In the past INTELSAT has provided domestic leases on a preemptible or secondary basis as satellite capacity and availability permitted. In the decision authorizing Comsat's participation in the INTELSAT V series satellites, the Commission noted that the provision of domestic service on a planned basis requires the expenditure of INTELSAT funds for dedicated satellite transponders and/or entire satellites.[36] Since U.S. ratepayers generally do not utilize INTELSAT-provided domestic capacity, the Commission noted its concern that this secondary service be viable. Based on the data submitted by Comsat, the Commission concluded that the service was probably viable. In addition, given the importance of domestic lease service to a number of countries, the Commission noted that "[o]ur concern for international comity mandates . . .. that we support INTELSAT's provision of these important services." 91 FCC 2d at 205. In the decision authorizing Comsat's participation in the INTELSAT VI satellites the Commission stated that the issue of PDS may best be handled in the context of the instructional process.[37]

51. Our previous decisions demonstrate that, while on the one hand, we are concerned that U.S. ratepayers not subsidize a service for which they have little use, we are also mindful of international comity considerations. As noted above, the need for the INTELSAT VII series satellites has been established, and we conclude that

INTELSAT's nominal 9+1(+3) plan is reasonable after examining the specific roles played by each orbital location to be filled by an INTELSAT VII satellite. Each of the specific locations where deployment of INTELSAT VII satellites is proposed has a specific international purpose which justifies its continuation, aside from considerations of PDS. Thus, we have found that there is a clear need for the proposed INTELSAT VII satellites to satisfy international requirements. We recognize, however, that there may eventually be some PDS use on certain of the satellites being procured. In particular, there may be significant amounts of PDS carried over the satellite located at 359^{0}E. Nevertheless, this possibility does not alter our conclusion that Comsat should be authorized to participate in the INTELSAT procurement as proposed. As noted above, several factors weigh in favor of maintaining this orbital location and replacing the existing satellite at that location with a satellite with the design characteristics of the INTELSAT VII series. Nor do we conclude that INTELSAT should have considered the instant procurement under Article III(e), rather than Article III(c), of the INTELSAT Agreement as PAS contends. We believe that the circumstances surrounding this procurement do not require consideration under Article III(e). As we noted in the *INTELSAT V* decision, use of INTELSAT satellites for PDS is a secondary use. We continue to be concerned with the pricing issues presented by PDS and here reaffirm that PDS pricing issues should be reviewed in the context of the instructional process.[38]

B. ***Other Issues***

52. PAS notes that the application does not comply with the Commission's procedural policy, which requires that such an application be filed at least 60 days before anticipated board action. PAS states that Comsat waited until the very last minute before filing. PAS also argues that Comsat's filing did not comply with Commission requirements because the application did not contain any financial information, and Comsat did not provide such information until 10 days before the Board of Governors' action. This delay, according to PAS, substantially prejudiced PAS, which did not have anywhere near the 60 days provided by Commission policy in which to evaluate Comsat's financial information and its showing with respect to the fifth satellite. According to PAS, the Commission must make an affirmative finding that Comsat's new facilities are in the public interest. In the context of Comsat procurement requests, PAS contends that this finding must be made before and not after INTELSAT commits to a procurement.

53. We agree that Comsat has failed to file the application within the 60 day time frame prior to action by the Board of Governors. Comsat's application was filed on July 12, 1988 and the INTELSAT Board of Governors meeting was held September 8-14, 1988. However, we are unpersuaded that PAS was prejudiced by the fact that Comsat missed the deadline by a few days. Of course, we recognize that the fact that financial information was not submitted at the time the application was filed takes the application outside of the 60 day time period. However, in considering past applications by Comsat to participate in INTELSAT programs for the construction and operation of new satellites, it has become clear that financial and other information often is not available or cannot be finalized until the Board of Governors makes a decision on the procurement. As a result, Comsat's applications need to be supplemented as more information becomes available to Comsat. Comsat did so in this instance, and PAS and other parties have had an opportunity to comment on this information. There is no evidence here to suggest that Comsat had the information and withheld it without justification. It appears that Comsat provided financial information as soon as it was made available by INTELSAT.[39]

54. Finally, we reach no decision with respect to GTE Spacenet's comments on the use of the INTELSAT system to routinely provide domestic links. Applications are currently pending which specifically raise this issue, and GTE Spacenet has opposed those applications on the same grounds set forth in its comments.[40] Therefore, issues relating to the use of the INTELSAT system to provide U.S. domestic service will be addressed in the context of those pending applications.

C. ***Conclusion***

55. After consideration of Comsat's application and all the relevant pleadings, we conclude that the public interest requires a grant of the subject application. The need for two INTELSAT VII satellites to replace two INTELSAT VA satellites in the POR that will reach the end of design life in the 1992/93 on time frame is not in dispute. We also do not find it unreasonable for INTELSAT to procure two spare satellies as insurance against launch failures of four remaining INTELSAT VI satellites as well as the two INTELSAT VII satellites to be deployed in the POR. Should no launch failures occur, the two contingent satellites will be deployed in the AOR at orbital locations where there is a clear need to replace existing satellites that will reach the end of design life in the 1993/95 time frame. We also find that the procurement of a fifth INTELSAT VII satellite as part of the initial buy is justified for economic and operational considerations. The procurement of a fifth INTELSAT VII satellite will be cheaper if purchased now and will be deployed in 1993 at the 359^{0}E orbital location which is important for national security and connectivity with the IOR. In light of the need for INTELSAT VII satellites to replace existing satellites that will reach the end of design life in the POR and AOR, we dismiss PAS' contention that INTELSAT's plan to use INTELSAT VII satellites to carry PDS diminishes the need for these new follow-on satellites.

56. Accordingly, IT IS ORDERED that the application of the Communications Satellite Corporation, File No. CSS-88-005, IS GRANTED and Comsat is authorized to participate in the construction of five (5) INTELSAT VII satellites, subject to the following terms and conditions:[41]

a. Comsat's capital expenditures toward this program shall be accounted for in a manner consistent with the proceedings in Docket No. 16070, 68 F.C.C. 2d 941 (1978);

b. Comsat shall not participate in the launch or in-orbit testing of any of the satellites for which its participation in construction is approved here unless specifically authorized by the Commission upon separate application; and

c. Comsat shall not participate in any substantive modifications in the construction program authorized here without prior approval by the Commission.

57. IT IS FURTHER ORDERED that the Petition to Deny filed by Pan American Satellite IS DENIED.

58. IT IS FURTHER ORDERED that the Motion to Dismiss for fee underpayment filed by Pan American Satellite IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On August 11, 1988 PAS filed a motion to dismiss the application based on Comsat's failure to pay the appropriate fee for the number of satellites for which it was requesting authority. According to PAS, Comsat only paid $1,800, the applicable fee for one satellite, instead of $9,000 for five satellites. On August 16, 1988 Comsat filed an opposition to PAS' motion and also tendered the remainder of the $9,000 fee which PAS claimed was understated. Since at the time Comsat filed its initial application INTELSAT had not determined the number of INTELSAT VII satellites to be procured as part of the initial buy, we deny PAS' motion to dismiss for fee underpayment. We also note that Comsat had paid the fee for five satellites by the time INTELSAT had determined that five satellites would be procured in the initial buy.

[2] In response to Comsat's supplement dated August 31, 1988, all parties were granted an extension of 30 days to respond to Comsat's opposition and supplemental information.

[3] Inclined orbit satellites are those that have reached the end of their design life or are otherwise impaired by the lack of fuel. Comsat's analysis did not take into account what role these satellites might play in satisfying particular requirements.

[4] The two INTELSAT VA satellites have been successfully launched. The INTELSAT VA (F-13) was launched on May 17, 1988 and the INTELSAT VA (F-15) was launched on January 26, 1989. In addition, the first INTELSAT VI (F-2) satellite was successfully launched on October 27, 1989.

[5] At the time Comsat filed its application, the eight satellites to be launched consisted of one INTELSAT VA, five INTELSAT VI and two INTELSAT VII satellites. As noted in footnote 4 *supra*, an INTELSAT VA and an INTELSAT VI satellite were successfully launched on January 26, 1989 and October 27, 1989, respectively.

[6] The advances in technology cited by Comsat are in the areas of spacecraft power systems, amplifiers (TWT and solid state), and digital circuit multiplication.

[7] Comsat notes that the e.i.r.p. levels at C-band on the INTELSAT VII hemi and zone beam transponders are 33 dBW, 2 dB higher than on the INTELSAT VI satellites (31 dBW) and 4 dB higher than on the INTELSAT V satellites (29 dBW).

[8] Comsat states that filing requirements under the Commission's Rules caused it to file the instant application before cost information was available. Comsat notes that it had to await a preliminary agreement between INTELSAT and Ford before relevant cost information could be developed and filed with the Commission. According to Comsat, that information was first made available to it on August 27, 1988.

[9] All prices applicable to the initial buy are firm-fixed prices. Based on the negotiated price for the initial procurement, the average cost per spacecraft is $111 million for three satellites, $102.5 million for four satellites and $96 million for five satellites. The incremental cost of procuring a fourth satellite as part of the initial buy is $77 million and $70 million for a fifth satellite. These costs do not include certain minor modifications to the INTELSAT VII (F-3) and INTELSAT VII (F-4) spacecraft. By letter dated December 5, 1989, Comsat notified the Commission of a proposal before the INTELSAT Board of Governors to incorporate certain minor modifications on some of the currently ordered INTELSAT VII spacecraft. These modifications were approved by the INTELSAT Board of Governors at its meeting held December 7-14, 1989. The INTELSAT VII (F-3) satellite will be modified to include the installation of a K-band S3 polarization switch at a nonrecurring cost of $523,000, a recurring cost of $95,000 per spacecraft, plus 33-1/3% in-orbit incentives on both costs. The INTELSAT VII (F-4) satellite will be modified to include an IOR Hemi/Zone coverage extension at a nonrecurring cost of $2.1 million, a recurring cost of $50,000 and 33-1/3% in-orbit incentives on both costs.

[10] The option prices are fixed prices expressed in October 1988 constant dollars and would be escalated by standard, previously agreed-upon indices to the date of order, and further escalated throughout a milestone payment plan.

[11] Because the User Forecast generated at the GTM has in the past been optimistic, the Director General now provides the Board with his own forecast, in addition to the User Forecast.

[12] These assumptions apply to so-called "Category A" services which include voice-grade services such as Frequency Modulation (FM), Time Division Multiple Access (TDMA) and Intermediate Data Rate (IDR). "Category B" services include INTELSAT Business Services (IBS) and video.

[13] Utilization is the ratio of the system's traffic load to its total capacity. Comsat notes that actual utilization can be affected by a number of factors in addition to traffic levels, such as transponder configurations, geographic distribution of traffic, the mix of transmission modes employed, characteristics of the earth stations accessing the system and power available on a transponder-by-transponder basis. Since these factors tend to reduce the amount of capacity capable of actual utilization, Comsat states that the system can never operate at, or even close to, actual 100% utilization, even when it is fully saturated. Thus, Comsat's use of projected utilization levels in excess of 100% is for illustrative purposes only based on the purely theoretical assumption that such levels are attainable.

[14] Comsat estimates that approximately three-fifths of this traffic will be carried on the INTELSAT VA (F-11) at the 177^0 E location, and two-fifths will be carried on the INTELSAT VA (F-10) at the 174^0 E location. Comsat notes that there is capacity on each satellite configured in an East-East configuration which is essentially unusable due to the unique geographic characteristics of the region. If this capacity were excluded from available capacity in the region, Comsat projects that utilization levels would increase to between 68%(DG) and 95%(User) in 1993.

[15] Comsat states that traffic will be distributed more or less evenly between the two satellites.

[16] PDS is a service under which INTELSAT offers, for the provision of domestic services, space segment capacity with a somewhat higher status than the fully preemptible domestic leases that INTELSAT also offers.

[17] According to PAS, if certain assumptions are changed, particularly assumptions regarding the need for transponders for domestic service, it would likely be possible to utilize fewer contingent satellites, thereby lessening the capital requirements for the INTELSAT VII series.

[18] As noted in footnotes 4 and 5, *supra*, one INTELSAT VA and one INTELSAT VI satellite have been successfully launched since the filing of Comsat's application. Thus, there have been 4 launch failures in the last 28 launches.

[19] Comsat Opposition, p. 25.

[20] In the *Report and Order* in CC Docket No. 79-184 we considered the issue of follow-on-satellites (FOS) and stated that "it appears that two FOS will be needed in the POR to replace the INTELSAT VA-10 and VA-11 spacecraft which reach the end of their design life in 1992 and 1993, respectively." Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to meet North Atlantic Telecommunications Needs During the 1991-2000 period, *Report and Order*, 3 FCC Rcd 3979, 3990 (1988).

[21] The INTELSAT VII satellites in the POR (if deployed in 1992/93), will reach the end of design life in the 2002/2003 time frame.

[22] The utilization levels for these satellites were based on the 1987 DG forecast. On May 2, 1989, Comsat supplemented its application by providing the 1988 DG forecast which projected a higher utilization level for the POR in 1993 and 2000. *See supra* paragraphs 17 and 18. However, no updated information was provided on the specific utilization levels for the two POR satellites.

[23] As discussed *supra* in notes 4, 5 and 18, one INTELSAT VA (F-15) and the first INTELSAT VI satellite have been successfully launched since the filing of Comsat's application. Thus, there have been 4 launch failures in the last 28 launches. Of the eight satellites for which two contingency spacecraft are specifically sought, six remain to be launched--four INTELSAT VI and two INTELSAT VII satellites.

[24] Comsat notes that historical evidence shows that there is a 17% probability of failure in connection with any single Ariane launch.

[25] Our consideration of the Comsat application takes into account the most recent successful launches of the INTELSAT VA (F-15) and the first INTELSAT VI satellites.

[26] Comsat has demonstrated that the incremental cost per satellite is less if purchased as part of the initial buy as opposed to the option schedule. For example, Comsat has indicated that the incremental cost of a fourth satellite procured as part of the initial buy would be $77 million. *See* also note 32, *infra*.

[27] Earth Station Ownership, 100 FCC 2d 250 (1984).

[28] Several IBS earth stations have been authorized in the western U.S. for operation with the INTELSAT AOR satellites. These earth stations cannot point to another INTELSAT satellite due to the poor "look angle".

[29] We note that Comsat asserts that the in-orbit system spare located at 332.5°E serves as the spare for the other nine satellites in all three ocean regions. We agree with Comsat that the maintenance of a separate satellite as an in-orbit spare is prudent and justified based on the overall size of the system and the number of satellites maintained in orbit.

[30] *See* para. 10 *supra*.

[31] The "drift" of an inclined orbit satellite is due to the fact that the satellite is not using stationkeeping fuel to maintain its position in the North-South direction. The satellite does maintain its East-West stationkeeping tolerance.

[32] Cost data submitted by Comsat shows that if a fifth INTELSAT VII satellite is procured as part of the initial purchase, the incremental cost would be approximately $70 million. Under the option schedule a fifth satellite would cost at least $91.2 million given the fact that twenty-seven months would have passed between the October 1988 contract date and January 1991, the projected launch date of the last INTELSAT VI. The $91.2 million cost consists of $69.3 million for the satellite plus an additional cost of $21.9 million due to a break in the production schedule. *See* Comsat's September 9, 1988 Further Supplement to its application, p. 6.

[33] *See* paragraphs 28 and 40 *supra*.

[34] The instructional process is the process by which the U.S. Government gives instructions to the U.S. Signatory (Comsat) with respect to INTELSAT actions. *See* footnote 38 *infra*.

[35] Communications Satellite Corporation, 91 FCC 2d 197, 205 (1982).

[36] *Id.*

[37] *See* Communications Satellite Corporation, File No. CSS-82-001-P, FCC 84-236, released May 25, 1984.

[38] The INTELSAT Board of Governors has considered PDS pricing issues on several occasions. At the 65th Board meeting (BG-65) held in December, 1985, the Board adopted a plan to establish two categories of PDS on INTELSAT V series satellites and to set prices for these services. The United States did not support this decision because it did not believe that there was sufficient information to determine whether the prices that were established covered fully allocated costs. In June, 1986 at BG-67, the U.S. submitted through its Signatory a pricing study prepared by the Commission which provided a range of cost-based prices for INTELSAT V transponders. The U.S. requested the Board to review the study and reconsider its prior decision as to INTELSAT V PDS prices. The Board did not take further action at BG-67. At BG-69 in December, 1986, the Board adopted new PDS prices for the INTELSAT V series. However, the U.S. did not support this decision because it continued to believe that certain of the new prices were not properly based on the costs of providing the services. In September of 1987 at BG-73, the U.S. Signatory submitted proposed PDS prices for the INTELSAT VI series. The prices had prior review and approval from U.S. government agencies. This U.S. Signatory submission was intended to conform with the basic principle embodied in earlier U.S. submissions that prices be based on fully distributed costs. The Director General had previously submitted prices that were substantially lower than those proposed by the U.S. Signatory. The Board decided to defer further consideration until BG-74 in December 1987. The Board directed the Director General to make recommendations for an integrated pricing plan for PDS capacity, taking into consideration the cost analysis and pricing proposals presented in his previous submission and that of the United States. At BG-74 in December 1987, the Board reached a consensus to adopt prices for certain PDS services (hemi-zone and spot beams) based on a compromise between the prices proposed by the United States and those proposed by the Executive Organ.

[39] *See* footnote 8 *supra*.

[40] *See* Comsat's Applications, File Nos. I-T-C-88-025 and I-T-C-88-027, filed November 11 and November 16, 1987, respectively. *See* also IBD's Applications, File Nos. CSG-88-011-ML and CSG-88-029-ML, filed on December 4, 1987 and February 12, 1988, respectively.

[41] Launch authority for the INTELSAT VII series satellites will be dealt with separately.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-573

In the Matter of

Philadelphia Metropolitan
Area Public Safety Plan

ORDER

Adopted: February 2, 1990; Released: February 9, 1990

By the Acting Chief, Private Radio Bureau and the Chief Engineer:

1. On October 2, 1989, the Philadelphia Metropolitan Area (Region 28) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Region 28 plan was placed on Public Notice for comments on December 14, 1989, 54 FR 51324 (Dec. 14, 1989). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Region 28 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Region 28.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 28 IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Region 28 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 9, 1990

SOUTHERN NEW ENGLAND TELEPHONE COMPANY AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

On January 29, 1990, Southern New England Telephone Company filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. On January 31, 1990, the American Telephone and Telegraph Company (AT&T) filed proposed revisions to its time reporting methodology and to the cost categories of its permanent cost allocation manual. These companies filed their original manuals in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to these cost manuals no later than **March 9, 1990.** Replies should be filed by **March 26, 1990.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for:

GTE Florida Incorporated
GTE North Incorporated
Michigan Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Southern Bell Telephone and Telegraph Company
Southwestern Bell Telephone Company
The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
United Intermountain Telephone Company
Wisconsin Bell, Inc;

and

The Elimination of the Requirement for Maintaining Vintage Reserves.

ORDER

Adopted: January 25, 1990; Released: January 31, 1990

By the Commission:

I. INTRODUCTION

1. In this Order, we prescribe depreciation rates and amortizations for eleven domestic carriers that filed requests in 1989 for changes in their annual depreciation rates,[1] and we eliminate the requirement for maintaining vintage reserves. We developed the prescribed depreciation rates and amortizations listed in the Appendix after considering the studies underlying the carriers' requests and the comments of the interested parties.

II. BACKGROUND

2. Depreciation is the loss of service value incurred in connection with the use and prospective retirement of telecommunications plant from known causes, the effect of which can be forecast with reasonable accuracy.[2] Depreciation accounting is the mechanism through which the loss in service value is distributed to operating expense during the service life of the plant. This Commission is authorized to prescribe depreciation rates to compute the allowable depreciation expense for telephone common carriers as part of our responsibilities under the Communications Act of 1934. [3]

3. Depreciation is an important factor in the determination of a carrier's revenue requirement. It has two primary effects. First, depreciation expense is included directly as a part of a carrier's revenue requirement. Second, the accumulation of the depreciation expense, which is commonly described as the depreciation reserve, is a deduction from the rate base and therefore affects the return and income tax components of a carrier's revenue requirement.

III. REVIEW PROCEDURES

4. It is our practice to review and revise, as necessary, depreciation rates and amortizations for approximately one-third of the larger local exchange carriers (LECs) each year. This year, in accordance with this triennial schedule, the LECs listed in the caption (with the exception of GTE Florida) submitted studies proposing new depreciation rates and amortizations based upon revised estimates of the primary depreciation factors (*i.e.*, equipment service life, net salvage and mortality dispersion patterns).

5. The Common Carrier Bureau (the Bureau) staff thoroughly reviewed the carriers' studies and proposals and prepared its own preliminary analyses. Pursuant to Section 220(i) of the Communications Act, 47 U.S.C. § 220(i), the Bureau transmitted these analyses by letter to the relevant state commissions. The Bureau then conducted meetings and telephone conversations with representatives of the state commissions and carriers to obtain additional information regarding depreciation factors for determination of the depreciation rates, amortizations, and expense levels. After these discussions, the Bureau reevaluated its preliminary recommendations, and, in many cases, revised them to reflect additional facts raised by the carriers and state commissions. Thereafter, the carriers formally filed with this Commission their proposals for the prescription of revised depreciation rates and amortizations.

6. The Bureau described the annual depreciation expense impact of its proposed rates and amortizations and initiated a pleading cycle by *Public Notice*, released August 18, 1989.[4] The Bureau transmitted to each carrier and respective state commission a copy of the *Public Notice* and a list of depreciation factors used to calculate its recommended depreciation rates and amortizations. The Florida Cable Television Association (FCTA), MCI Communications Corporation (MCI), The National Cable Television Association Inc. (NCTA), and the staff of the Virginia State Corporation Commission (Virginia staff) filed comments. AT&T, Ameritech, Bell Atlantic, New York Telephone Company, Northwestern Bell Telephone, Southern Bell Telephone and Southwestern Bell Telephone Company filed reply comments.

IV. DISCUSSION

7. We conclude, based upon the record in this proceeding, that the carriers' proposed depreciation rates and amortizations are consistent with the Bureau's recommendations,[5] and that no party has filed valid objections to these factors.[6] The record herein supports the depreciation rates and amortizations proposed in the *Public No-*

tice, and accordingly, we prescribe those rates and amounts for the subject carriers. Certain other issues raised by the commenting parties, and other peripheral issues that we raise on our own motion, are discussed below.

A. *GTE Florida Analog Electronic Switching*

8. The Bureau conducted a complete review of GTE Florida's accounts in 1988. The Bureau found, and the Commission agreed, that unresolved questions remained about GTE Florida's economic selection studies, which were the basis for its retirement schedule for the COE Analog ESS account. Accordingly, the Commission directed the Bureau to continue its review of GTE Florida's plans and make a recommendation in 1989.[7] The Bureau accordingly requested and received additional supporting data from GTE Florida. After review of those data and discussions with the carrier, the Bureau informally recommended a depreciation rate for the account which was lower than GTE Florida's 1988 proposed rate. Thereafter, GTE Florida requested that we prescribe the depreciation rate proposed by the Bureau. No party opposed that rate, and in view of the record on this issue, we prescribe that depreciation rate, which is shown in the Appendix.

B. *Southern Bell - Cable Television Industry Objections*

9. In their comments, FCTA and NCTA take issue with how Southern Bell, in its depreciation study, portrayed the cable television industry. NCTA states that "[t]o the extent that the carrier believes it is uniquely capable of providing necessary broadband video distribution facilities in the next decade and the next century, its assessment belies a fundamentally distorted picture of the future of the cable industry".[8] FCTA states that "[t]he many references to video services in Southern Bell's submission are irrelevant to the decision on depreciation rates . . . and are further based upon erroneous factual assumptions and flawed policy proposals."[9] In response to NCTA and FCTA, Southern Bell contends that these comments are aimed not at the Commission's proposed depreciation rates, but rather at one factor cited by Southern Bell as justification for its original proposal. Since, as both NCTA and FCTA acknowledge, the *Public Notice* did not propose adoption of Southern Bell's original proposal, Southern Bell asserts that this issue is moot.

10. Both associations, while expressing concern for how Southern Bell has characterized the cable industry, concur with the depreciation rates proposed in the *Public Notice*. The fact that Southern Bell's original proposal contains controversial language does not require us to take any action in this regard beyond our finding in this order that the rates under consideration should be prescribed. Thus, there is no need for us to rule on the cited concerns of NCTA and FCTA.

C. *Shared Network Facilities Agreement (SNFA) Contracts*

11. MCI requests that this Commission direct the BOCs to separate the investment associated with terminated Shared Network Facilities Agreement (SNFA)[10] contracts from the investment used to compute depreciation and amortization charges for general ratepayers. In support of its requests, MCI contends that SNFA contracts are analogous to special construction services in which facilities are designed and built to meet the specific needs of a single customer. MCI states that, when a customer orders such a service, the LEC assesses special construction charges to recover its costs to design and construct the facility and assesses recurring charges to recover on-going maintenance, depreciation, return on investment, and other expenses associated with the facility. MCI further states that termination liability charges would be assessed to recover the cost of stranded investment if the customers were to terminate the service prior to a specified period and that at no time would any other ratepayer be forced to pay for any of the costs associated with the special construction service facility.

12. MCI states that SNFAs are an identical case. MCI claims that these facilities were offered only to AT&T and that AT&T allegedly paid some of the costs associated with the equipment involved as long as the SNFA remained in effect. MCI argues that AT&T should continue to bear any remaining costs of depreciation and amortization after the SNFA is terminated, just as a special construction service customer must pay termination liabilities.

13. In reply comments, several parties argue that MCI is wrong in its contention that SNFA facilities are the same as special construction services and point out differences which they claim set them apart.[11] They point out that SNFA facilities were not specifically constructed and dedicated for use only by AT&T but rather are multifunctional facilities that were either in existence or planned at divestiture with title to the facility assigned to the BOC as the predominant user. Ameritech points out that, unlike special construction facilities, SNFA contracts contemplated full use of the facility by the BOC after the SNFA contract expired, as reflected, in part, by the costing of SNFA facilities using Commission-prescribed depreciation rates.

14. As indicated by the reply comments, a comparison of SNFA facilities with special construction services shows that there are significant differences between them. Unlike special construction services, SNFA facilities were not specially constructed for a single customer. SNFA facilities are multifunctional facilities that are used jointly by the BOCs, which own the facilities, and AT&T pursuant to the SNFAs.

15. In this Commission's view, the differences between SNFA facilities and special construction services are sufficient to find MCI's arguments to be without merit. In addition, even if the special construction services and SNFA facilities were identical, as MCI contends, that would not, in itself, mandate the separation of the investment associated with terminated SNFA contracts as MCI requests because such treatment is not used for special construction services. No special accounting provisions are attached to special construction services. Facilities related to special construction services are incorporated into the prescribed depreciation rates based on their estimated service lives. Retirements of special construction service facilities are accounted for using the same accounting entries required for other plant and equipment retirements. Accordingly, MCI's request is hereby denied.

D. *Effective Dates of Depreciation Rate Changes*

16. The Virginia staff questions our current policy of allowing a carrier to select an effective date between January 1 of the study year and January 1 of the year following the study year. The Virginia staff urges the FCC to implement a policy of booking depreciation rates on January 1 of the study year. It objects to our current policy

because, in its view, that policy fails to match accurately depreciation expense with the actual consumption of plant, and, accordingly, misrepresents the financial condition of the company. The Virginia staff further states that for at least the past decade the industry and its consultants have criticized regulatory commissions for the alleged regulatory practice of artificially suppressing depreciation rates. The Virginia staff asserts that now, when presented with an opportunity to enhance their position, many companies are not taking full advantage of depreciation rate represcription.

17. In its reply comments, New York Telephone contends that, with regard to the issue of effective dates, Virginia's proposal is clearly at odds with both Section 43.43(e) of our Rules and our past practices, which allow carriers to request an effective date between January 1 of the filing year and January 1 of the subsequent year. New York Telephone states that the Commission should reject Virginia's proposal.[12]

18. In 1980, the FCC adopted the use of the remaining-life and equal life group methodologies.[13] To implement the new methods, the Commission allowed the carriers some flexibility in setting the effective date of our depreciation rates in order to accommodate their need to file tariffs incorporating the new rates. The Commission stated that allowing a carrier to request an effective date between January 1 of the filing year and January 1 of the subsequent year strikes the proper balance between the requirements of proper accounting (which argues for the immediate imposition of new rates) and the realities of the regulatory process (which prevents carriers from immediately responding to changes in their revenue requirement).

19. The Virginia staff raises concerns regarding current FCC policy with respect to establishing effective dates for depreciation rate prescriptions. Due to the many regulatory changes that have transpired during the 1980's, we believe that it may be time to reassess our policy. However, in this proceeding we did not request comments on an effective date policy change and, hence, no record has been established. We direct the staff to review our policy and make specific recommendations to us in 1990 if such a review is warranted. For the carriers identified in this *Order*, we adopt the effective dates shown in the Appendix.[14]

E. ***Amortizations for Dying Accounts***

20. Our remaining-life procedures engender a number of technical problems when applied to accounts that are rapidly being phased out (*i.e.*, "dying accounts"). For example, if the final date of termination of service is mis-forecast by as little as a few months, the depreciation rates can change drastically. The most practical way of resolving this problem is to apply an amortization procedure which adjusts the depreciation expense each month to reflect accounting activity.[15] This allows the carriers to reduce the account balance to zero in relatively equal increments.

21. During the 1989 review, the Bureau identified 22 "dying accounts", and concluded after thorough review that the use of an amortization procedure to write off these accounts is consistent with this Commission's policy and practice. No commenting party opposed this proposal for these accounts.[16] We conclude that special amortization procedures should be used for the accounts and amortization periods indicated below:

Company and Jurisdiction	Account	Amortization Period (Months)
C&P of Maryland	Step-by-Step	12
	Crossbar	12
GTE North-PA	Operator Systems	12
New York Telephone	Crossbar Adjuncts	45
Southern Bell-Fl	Step-by-Step	3
	Crossbar	3
	Operator Systems-Crossbar	24
-GA	Step-by-Step	12
	Crossbar	12
	Operator Systems-Crossbar	24
-NC	Step-by-Step	24
	Crossbar	24
	Operator Systems-Crossbar	24
-SC	Step-by-Step	36
	Crossbar	36
	Operator Systems-Crossbar	24
Southwestern Bell-MO[17]	Step-by-Step	36
	Crossbar	36
United Inter Mountain-TN	Step-by-Step	12
	Operator Systems	18
Wisconsin Bell	Step-by-Step	24
	Crossbar	12

22. The special procedure for calculating the amortization for "dying accounts" is as follows:

a. Determine the net service value (*i.e.*, gross book cost, less book reserve, less the estimated future net salvage shown in the Appendix) at the beginning of each month.

b. Divide the net service value determined in Step 1 by the number of months remaining in the amortization period. For example, if the amortization period is 36 months, the first month's amortization is 1/36 of the net service value at the beginning of the first month. The second month's amortization is 1/35 of the net service value at the beginning of the second month, and so on.

F. ***Vintage Reserves***

23. During the 1989 depreciation rate review, we have reconsidered on our own motion our requirement that carriers maintain vintage depreciation reserves.[18] When the Commission originally adopted the Equal Life Group (ELG) method of calculating depreciation rates,[19] it prescribed depreciation rates by vintage and required carriers to maintain vintage reserves. Within a few years, the Commission recognized that its requirement of vintage depreciation rates would soon become an overwhelming administrative burden. Accordingly, the Commission changed its policy to no longer require the calculation of vintage depreciation rates, but rather to require only a single composite rate for each account.[20] This change, however, has made the determination of accurate vintage reserves impossible. Therefore, by this *Order*, we eliminate the requirement that carriers maintain vintage reserves within an account in order to be granted ELG treatment for that account.[21] However, in order for an account to be eligible for ELG treatment, it is still necessary for the

carriers to maintain vintage mortality data (*i.e.*, investments, retirements, adjustments, etc.) in order to obtain accurate observed life tables and survivor curves.[22]

G. ***Submission of Whole - Life Depreciation Parameters***

24. In the depreciation prescription orders that the Commission has approved since its decision in *Property Depreciation*, the Commission has required that depreciation filings include whole-life rates so that we could determine the size of the depreciation reserve imbalance and the speed with which its actions were resolving the imbalance. Because of our continued interest in these matters, we require carriers in this *Order* to continue to file whole-life rates that are consistent with the prescribed rates until notified to the contrary.

H. ***Conclusion***

25. Having considered the carriers' proposals, and the studies upon which those proposals are based, the views and recommendations of the states, the responses to the *Public Notice*, and the Bureau's studies and analyses, we adopt the depreciation rates, amortization amounts, and effective dates listed in the Appendix.

V. ORDERING CLAUSES

26. ACCORDINGLY IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 201-205 and 220(b), that the percentages of depreciation and amortization amounts set forth in the Appendix to this Order ARE PRESCRIBED, effective on the dates listed.

27. IT IS FURTHER ORDERED, that carriers no longer need to maintain vintage reserves within an account.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] This Commission conducted a full review for the carriers listed in the caption, except GTE Florida. For GTE Florida, we reviewed only one account, Analog Electronic Switching. *See* paragraph 8, *infra*.

[2] 47 C.F.R Section 32.9000.

[3] *See generally* 47 U.S.C. § 220(b) (1982). In recent years, we have also prescribed amortization amounts to resolve depreciation accounting problems. *See* Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, *Report and Order*, 3 FCC Rcd 984 (1988) (hereinafter, the *Amortization Order)*. An amortization amount is a specific amount to be charged to depreciation expense each year as opposed to a depreciation rate which is applied to the plant investment to determine the depreciation expense charge.

[4] Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies - Pleading Cycle Established, 4 FCC Rcd 6263 (1989) (*Public Notice)*.

[5] Southwestern Bell Telephone Company (SWBT) filed an *ex parte* communication with this Commission, dated October 25, 1989, requesting a modification to the Bureau's *Public Notice* recommendation in the state of Missouri. *See* paragraph 18, *infra*.

[6] MCI asserts that 8 amortization amounts for Southern Bell's Florida and South Carolina jurisdictions as proposed in the *Public Notice* are overstated because this Commission previously prescribed lower amounts. MCI is incorrect in its assertion. The amortization amounts proposed for Southern Bell are based upon an erratum to the order in which the Commission prescribed the amortizations. *See Erratum*, 3 FCC Rcd 1755 (1988). Therefore, MCI's concerns are without merit.

[7] The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for: Cincinnati Bell Telephone Company *et. al.*, 4 FCC Rcd 1148 (1989).

[8] NTCA comments at 2.

[9] FCTA comments at 2.

[10] SNFA contracts were established between AT&T and the BOCs at divestiture to provide for continued joint use of multifunctional facilities.

[11] Ameritech, AT&T, Bell Atlantic, Northwestern Bell and Southern Bell.

[12] New York Telephone reply comments at 2.

[13] *See* Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) (*Property Depreciation)*.

[14] In an *ex parte* communication dated October 12, 1989, United Intermountain revised its requested effective date to January 1, 1989. The Appendix reflects this change.

[15] *See, e.g.*, The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for: American Telephone and Telegraph Company *et al.*, 96 FCC 2d 257 (1983).

[16] In its *ex parte* communication (*see* note 5, *supra)*, SWBT requested that we consider a revised retirement plan for the Step-by-Step and Crossbar accounts in Missouri, which has been approved by the Missouri Public Service Commission. We conclude that this revised plan submitted by SWBT appears appropriate. Consequently, we find that dying account amortization treatment should be afforded SWBT's Missouri Step-by-Step and Crossbar accounts, instead of the remaining-life depreciation rates proposed in the *Public Notice*.

[17] *See* note 15, *supra*.

[18] Vintage reserve depreciation requires that separate depreciation reserve balances be kept for each year in which plant was placed in service. For example, for the Poles Account, separate reserve balances would likely have to be kept for poles placed in 1950, 1951, 1952 . . . . 1990.

[19] *See Property Depreciation, supra*.

[20] *See* The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for: The Bell Telephone Company of Pennsylvania *et. al.*, 103 FCC 2d 185 (1985), *recon. denied*, 2 FCC Rcd 842 (1987).

[21] We did not seek comment on this proposed change in our procedures. Because we are eliminating a requirement that carriers compile data that neither serve any regulatory need nor produce accurate depreciation studies, this change constitutes a minor amendment to our procedures in which the public is not likely to be interested. Therefore, we find for good cause that compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U. S. C. § 553(B).

[22] *See* The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for: General Telephone Company of the Southeast *et. al.*, 90 FCC 2d 997 (1982).

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

Effective January 1, 1989

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	2.8	16	49.6	12.3	-426
2113	AIRCRAFT	3.6	40	37.3	6.3	0
2115	GARAGE WORK EQUIP.	12.0	1	30.5	5.7	4
2116	OTHER WORK EQUIP.	10.1	1	23.4	7.5	38
2121	BUILDINGS	33.0	2	20.2	2.4	1342
2122	FURNITURE	12.0	3	21.7	6.3	460
2123	OFF/COMP COMM EQUIP	6.7	1	31.6	10.1	586
2124	COMPUTERS	3.9	5	44.1	13.1	1697
2211	ANALOG ELEC. SWG	8.8	5	35.3	6.8	16430
2212	DIGITAL ELEC. SWG	12.8	6	16.7	6.0	789
2220	OPERATOR SYSTEMS	8.0	3	68.3	3.6	80
2231	RADIO SYSTEMS	9.4	4	37.5	6.2	-84
2232	DDS CIRCUIT EQUIP.	6.3	1	27.2	11.4	-114
2232	DIGITAL CIRCUIT EQUIP.	7.9	1	27.4	9.1	9276
2232	ANALOG CIR. EQUIP	5.4	1	39.3	11.1	5157
2351	PUBLIC TELE. EQUIP.	5.8	2	56.9	7.1	258
2362	TERM EQUIP. OTHER	8.9	-2	36.5	7.4	-3442
2411	POLES	23.0	-75	42.4	5.8	1958
2421	AERIAL CABLE	15.4	-12	36.8	4.9	11476
2422	UNDERGROUND CABLE	18.8	-6	24.0	4.4	4133
2423	BURIED CABLE	16.6	-6	27.7	4.7	1859
2424	SUBMARINE CABLE	8.0	-10	88.8	2.7	-8
2426	INTRBLDG. CABLE	15.0	-32	33.9	6.5	1175
2441	CONDUIT SYSTEMS	45.0	-10	23.4	1.9	663

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is not used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY

Effective January 1, 1989

Rate Category Description		Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	3.8	15	40.0	11.8	-10
2115	GARAGE WORK EQUIPMENT	7.0	6	49.6	6.3	2
2116	OTHER WORK EQUIPMENT	8.5	6	37.1	6.7	15
2121	BUILDING	28.0	10	19.9	2.5	-185
2122	FURNITURE	8.7	20	22.9	6.6	45
2123	OFFICE SUPPORT	5.9	27	24.9	8.2	19
2123	COMPANY COMM.	6.9	5	25.0	10.1	134
2124	COMPUTERS	2.8	10	46.8	15.4	0
2211	ANALOG SWITCHING EQ.	8.1	3	42.8	6.7	3896
2212	DIGITAL SWITCHING	13.0	3	14.7	6.3	19
2212	CUSTOMER PREMISE	4.9	25	30.1	9.2	0
2215	CROSSBAR SWITCHING	0.0	-1	101.0	5.0	0
2220	OPERATOR SYSTEMS	7.1	3	34.7	8.8	48
2231	RADIO SYSTEMS	8.7	-3	38.3	7.4	-1
2232	DIGITAL DATA SYSTEMS	7.5	-4	36.2	9.0	-52
2232	DIGITAL CIRCUIT EQ.	7.6	3	26.4	9.3	0
2232	ANALOG CIRCUIT EQ.	7.7	0	43.0	7.4	-44
2351	PUBLIC TELEPHONE EQ.	5.3	0	64.7	6.7	95
2362	TEL. & MISC. EQ.	4.1	3	74.1	5.6	-264
2362	OTHER TERM EQ.	5.9	-5	36.3	11.6	-152
2411	POLES	19.2	-115	96.7	6.2	118
2421	AERIAL CABLE	12.9	-12	62.1	3.9	20
2422	UNDERGROUND CABLE	17.1	-31	49.7	4.8	4092
2423	BURIED CABLE	15.4	-7	33.5	4.8	-86
2424	SUBMARINE CABLE	6.3	-3	83.5	3.1	-9
2426	INTRABLDG. NETWK CABLE	11.6	-13	37.2	6.5	24
2441	CONDUIT SYSTEMS	36.0	-10	35.6	2.1	-78

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND

Effective January 1, 1989

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	(%) E
2112 MOTOR VEHICLES	4.0	15	42.0	10.8	0
2115 GARAGE WORK EQUIP	9.3	4	31.6	6.9	0
2116 OTHER WORK EQUIP	9.6	4	18.6	8.1	0
2121 BUILDINGS (OWNED)	30.0	8	20.9	2.4	479
2122 FURNITURE	13.1	10	21.4	5.2	-93
2123 OFFICE EQUIP-CO COMM EQ	5.3	5	53.8	7.8	0
2123 OFFICE EQUIP-SUPPORT	5.8	8	22.3	12.0	-54
2124 GENERAL COMPUTERS	3.8	7	41.2	13.6	0
2211 ANALOG ELECTRONIC	8.4	0	39.6	7.2	6946
2212 DIGITAL ELECTRONIC	12.8	5	15.0	6.3	760
2215 CROSSBAR	—	-2	—	—	@
2215 STEP-BY-STEP	—	-2	—	—	@
2220 OPER SYSTEMS-DIGITAL	12.5	5	5.9	7.1	0
2220 OPER SYS-XBAR/ANALOG	3.3	0	71.5	8.6	74
2231 RADIO SYSTEMS	10.5	10	19.4	6.7	-165
2232 CIRCUIT EQUIP-ANALOG	6.4	0	40.6	9.3	1670
2232 CIRCUIT EQUIP-DDS	8.0	10	16.0	9.3	-123
2232 CIRCUIT EQUIP-DIGITAL	7.7	1	31.3	8.8	3786
2351 PUBLIC TELEPHONE	4.6	5	55.5	8.6	0
2362 OTHER TERM EQUIP	5.9	-7	46.5	10.3	-108
2362 OTHER TERM EQ-TEL & MIS	4.9	0	66.8	6.8	-609
2411 POLES	20.0	-51	36.2	5.7	-1433
2421 AERIAL CABLE	13.6	-23	40.2	6.1	5959
2422 UNDERGROUND CABLE	17.8	-38	40.2	5.5	7956
2423 BURIED CABLE	17.3	-9	29.4	4.6	3939
2424 SUBMARINE CABLE	13.6	-3	43.9	4.3	0
2426 INTRABUILDING CABLE	12.2	-23	51.6	5.9	974
2441 CONDUIT SYSTEMS	46.0	-7	18.5	1.9	65

The figures in Columns B, C, and D are precentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts except Step-by-Step and Crossbar as indicated below.

@ As described in paragraph 21 of the Order, the net service values for the Crossbar and Step-by-Step accounts are to be amortized over a twelve month period ending December 31, 1989.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE FLORIDA INCORPORATED

Effective January 1, 1989

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2211	ANALOG ELECTRONIC SWITCHING	4.2	-2	51.7	12.0	898

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amount in Column E, ordered in FCC 88-427, released January 25, 1989, is continued.

For all other accounts, see FCC 88-427, released January 25, 1989.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - ILLINOIS

Effective January 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	12/31/88 Book Reserve	Remaining Life Rate
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112	MOTOR VEHICLES	3.4	15	55.5	8.7
2113	AIRCRAFT	3.2	40	32.0	8.8
2115	GARAGE WORK EQ	7.8	0	49.4	6.5
2116	OTHER WORK EQ	7.8	0	58.8	5.3
2121	BUILDINGS	26.0	0	26.7	2.8
2122	FURNITURE	9.2	5	9.2	9.3
2123	OFFICE EQUIPMENT	7.5	1	56.7	5.6
2124	GEN. PUR. COMPUTERS	3.2	5	6.9	27.5
2211	ANALOG ELECT. SW.	7.6	3	54.4	5.6
2212	DIGITAL ELECT. SW.	12.9	3	18.2	6.1
2215	ELECTROMECH. SW.	6.8	-4	72.6	4.6
2215	ELECTROMECH. REC.	5.3	0	89.7	1.9
2220	OPERATOR SYSTEMS	3.2	-1	29.8	22.3
2231	RADIO SYSTEMS	4.5	0	64.2	8.0
2232	CIRCUIT EQUIPMENT	6.8	6	39.8	8.0
2351	PUBLIC TEL. TERM. EQ	4.5	5	87.2	1.7
2362	OTHER TERMINAL EQ.	6.7	1	87.4	1.7
2411	POLES	14.4	-70	68.2	7.1
2421	AERIAL CABLE-METAL	16.0	-36	48.9	5.4
2421	AERIAL CABLE-NONMET.	17.8	-20	18.7	5.7
2422	UNDRGRND CABLE-METAL	19.0	-20	28.8	4.8
2422	UNDGRND CABLE-NONMET	21.0	-10	6.3	4.9
2423	BURIED CABLE-METAL	16.6	-10	38.4	4.3
2423	BURIED CABLE-NONMET	21.0	-5	9.0	4.6
2424	SUBMARINE CABLE	13.1	0	56.7	3.3
2426	INTRABLDG NETWORK CABLE	11.1	-40	64.8	6.8
2431	AERIAL WIRE	2.4	-86	184.5	0.6
2441	CONDUIT SYSTEMS	36.0	0	25.6	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - INDIANA

Effective January 1, 1990

Rate Category Description		Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	3.6	13	41.9	12.5	0
2113	AIRCRAFT	2.9	55	10.7	11.8	0
2115	GARAGE WORK EQ	12.5	0	30.1	5.6	-11
2116	OTHER WORK EQ	10.8	2	15.9	7.6	65
2121	BUILDINGS	35.0	0	12.0	2.5	-663
2122	FURNITURE	9.9	3	26.3	7.1	281
2123	OFFICE EQ	7.6	1	38.0	8.0	0
2124	GEN. PUR. COMP.	3.4	5	36.9	17.1	0
2211	ANALOG ELECT. SW.	8.1	4	27.8	8.4	1437
2212	DIGITAL ELECT. SW.	12.9	5	17.5	6.0	-326
2215	ELECTROMECH. SW.	4.3	-1	69.2	7.4	0
2215	ELECTROMECH. REC.	4.0	-1	78.4	5.6	0
2220	OPERATOR SYSTEMS	1.5	-3	65.2	25.2	0
2231	RADIO SYSTEMS	5.4	-4	61.1	7.9	95
2232	CIRCUIT EQUIPMENT	7.3	6	41.4	7.2	2644
2351	PUB. TEL. TERM. EQ.	4.9	5	66.4	5.8	0
2362	OTHER TERMINAL EQ	6.8	1	75.9	3.4	0
2411	POLES	15.8	-52	55.8	6.1	131
2421	AERIAL CABLE-METAL	13.8	-32	50.4	5.9	2046
2421	AERIAL CABLE-NONMET.	21.0	-10	10.2	4.8	-16
2422	UNDRGRND CABLE-METAL	19.8	-22	38.5	4.2	1087
2422	UNDRGRND CABLE-NONMET	22.0	-5	6.7	4.5	-11
2423	BURIED CABLE-METAL	12.9	-12	33.1	6.1	1498
2423	BURIED CABLE-NONMET.	21.0	-5	11.3	4.5	-73
2424	SUBMARINE CABLE-METAL	5.0	0	77.2	4.6	-1
2426	INTRABLDG NETW CABLE	11.1	-35	39.9	8.6	0
2431	AERIAL WIRE	4.2	-60	121.9	9.1	0
2441	CONDUIT SYSTEMS	42.0	-10	27.0	2.0	-34

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - PENNSYLVANIA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.7	11	64.1	6.7	0
2115	GARAGE WORK EQ	10.6	0	42.8	5.4	0
2116	OTHER WORK EQ	9.9	2	43.5	5.5	0
2121	BUILDINGS	26.0	5	38.4	2.2	0
2122	FURNITURE	8.2	5	15.1	9.7	0
2123	OFFICE EQUIPMENT	7.6	1	48.5	6.6	0
2124	GEN. PUR. COMPUTERS	3.2	5	33.8	19.1	0
2211	ANALOG ELECT. SW.	4.5	0	74.0	5.8	0
2212	DIGITAL ELECT. SW.	12.9	5	18.8	5.9	0
2215	ELECTROMECH. SW. @	3.1	-2	79.1	7.4	4292
2215	ELECTROMECH. REC.	3.7	-1	89.7	3.1	0
2220	OPERATOR SYSTEMS - TOPS	15.0	-2	0.0	6.8	0
2220	OPERATOR SYSTEMS - TSPS	—	-2	—	—	#
2231	RADIO SYSTEMS	4.5	-3	65.4	8.4	0
2232	CIRCUIT EQUIPMENT	7.0	10	31.9	8.3	0
2351	PUBLIC TEL. TERM. EQ	5.9	5	34.5	10.3	0
2362	OTHER TERMINAL EQ.	6.9	1	72.0	3.9	0
2411	POLES	20.0	-36	42.8	4.7	0
2421	AERIAL CABLE-METAL	18.1	-22	46.6	4.2	0
2421	AERIAL CABLE-NONMET.	18.5	-10	13.3	5.2	0
2422	UNDRGRND CABLE-METAL	25.0	-20	26.0	3.8	0
2422	UNDGRND CABLE-NONMET	21.0	-10	20.0	4.3	0
2423	BURIED CABLE-METAL	14.8	-12	34.9	5.2	0
2423	BURIED CABLE-NONMET	18.6	-5	10.4	5.1	0
2426	INTRABLDG NETW CABLE	11.1	-40	41.8	8.8	0
2431	AERIAL WIRE	5.2	-36	101.8	6.6	0
2441	CONDUIT SYSTEMS	43.0	-6	30.7	1.8	0

The figures in Columns B, C, and D are percentages of gross book cost.

@ Continuation of amortization of the reserve imbalance over five years, ending March 31, 1991. The reserve level in Column C is used to calculate the depreciation rate and does not reflect the book reserve.

As described in paragraph 21 of the Order, the net service value for the Operator Systems-TSPS Account is to be amortized over a twelve month period ending December 31, 1990.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
MICHIGAN BELL TELEPHONE COMPANY

Effective January 1, 1989

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	3.4	9	54.2	10.8	0
2114	SPECIAL PURPOSE VEHICLES	9.1	4	32.3	7.0	0
2115	GARAGE WORK EQUIPMENT	8.8	4	21.0	8.5	-4
2116	OTHER WORK EQUIPMENT	8.5	4	31.5	7.6	-44
2121	BUILDINGS	30.0	8	22.1	2.3	-643
2122	FURNITURE	9.8	3	33.8	6.4	-134
2123	OFFICE EQUIPMENT	4.8	3	45.2	10.8	-106
2123	COMPANY COMM EQUIPMENT	3.1	3	67.1	9.6	0
2124	GENERAL PURPOSE COMPUTERS	3.1	3	57.8	12.6	0
2211	ESS-ANALOG SWITCHING	8.0	0	45.6	6.8	14768
2212	ESS-DIGITAL SWITCHING	12.9	1	14.9	6.5	23
2215	STEP-BY-STEP SWITCHING	2.4	-3	71.8	13.0	0
2215	CROSSBAR SWITCHING	2.3	-8	70.7	16.2	0
2220	OPERATOR SYSTEMS	4.7	6	58.5	7.6	162
2231	RADIO SYSTEMS	7.2	-3	47.8	7.7	-576
2232	CIRCUIT-DDS	6.9	-2	37.0	9.4	81
2232	CIRCUIT-DIGITAL	8.0	2	31.2	8.4	2855
2232	CIRCUIT-ANALOG	5.9	-2	43.7	9.9	1782
2351	PUBLIC TELEPHONE	5.3	1	55.7	8.2	0
2362	OTHER TERMINAL EQUIPMENT *	7.5	8	80.7	1.5	0
2411	POLES	17.0	-61	62.9	5.8	1033
2421	AERIAL CABLE	10.0	-32	46.7	8.5	11907
2422	UNDRGROUND CA-NONMETALLIC	23.0	-19	17.5	4.4	333
2422	UNDRGROUND CABLE-METALLIC	18.9	-19	33.2	4.5	4216
2423	BURIED CABLE-NONMETALLIC	24.0	0	14.9	3.5	430
2423	BURIED CABLE-METALLIC	16.5	-7	36.3	4.3	14640
2424	SUBMARINE CABLE	13.1	-3	60.0	3.3	7
2426	INTRABUILDING CABLE	15.1	7	36.5	3.7	166
2431	AERIAL WIRE	—	-80	180.0	0.0	0
2441	CONDUIT SYSTEMS	43.0	-10	23.5	2.0	1889

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988 and as amended by Memorandum and Order AAD 8-1917, released March 30, 1988, are continued.

* The first ELG year for the Other Terminal Equipment Account is 1989.

Effective January 1, 1990 (1)

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years)	(%)	(%)	(%)	($000)
	A	B	C	D=(100%-B-C)/A	E
2112 MOTOR VEHICLES	2.8	6	59.8	12.2	0
2114 SPEC PURP VEHICLES	6.0	5	43.7	8.6	0
2115 GARAGE WORK EQPT	6.0	5	38.3	9.5	0
2116 OTHER WORK EQPT	6.0	5	35.4	9.9	-247
2121 BUILDINGS	39.0	-1	18.1	2.1	-11625
2121 BUILDINGS-FIXTURES	11.9	-4	16.8	7.3	149
2122 FURNITURE	12.6	2	26.6	5.7	321
2123 OFFICIAL COMM EQPT-SA	3.4	-2	64.2	11.1	0
2123 OFFICIAL COMM EQ-PBX/IS	4.8	2	70.4	5.7	0
2123 OFFICE EQUIPMENT	11.6	2	15.3	7.1	159
2124 GENL PURP COMPUTERS	2.1	6	58.8	16.8	0
2211 ELEC SWITCH-ANALOG	7.8	4	39.2	7.3	40480
2212 ELEC SWITCH-DIG	13.2	5	12.3	6.3	3201
2215 ELECTROMECH - XBAR ADJ	—	-5	—	—	@
2215 ELECTROMECHANICAL-SXS	2.4	-8	74.0	14.2	0
2215 ELECTROMECH-CROSSBAR	1.8	-5	60.2	24.9	0
2220 OPERATOR SYSTEMS	4.4	0	31.6	15.5	0
2231 RADIO SYSTEMS	8.4	-4	38.2	7.8	605
2232 CIRCUIT-DDS	6.1	-5	32.1	12.0	-71
2232 CIRCUIT-OTHER	6.8	-5	30.6	10.9	45803
2311 STA APP T&M	4.5	3	51.1	10.2	0
2351 PUB TEL-COINLESS	2.8	0	69.2	11.0	0
2351 PUB TEL-OTHER	3.7	1	61.4	10.2	0
2362 OTHER TERM EQ-NON CPE	3.9	-10	51.9	14.9	0
2411 POLE LINES	23.0	-98	53.8	6.3	3766
2421 SUBR AER CA	17.8	-19	37.0	4.6	14342
2421 SUBR AER CA-OTHER	15.7	-36	45.3	5.8	41611
2421 TRUNK AERIAL CA-FIBER	20.0	-20	7.7	5.6	0
2421 TRUNK AERIAL CA-METAL	11.2	-23	36.1	7.8	1980
2422 SUBR UG CABLE-FIBER	22.0	-23	12.6	5.0	0
2422 SUBR UG CABLE-METAL	21.0	-36	35.9	4.8	19758
2422 TRUNK UG CABLE-FIBER MM	10.0	-9	9.5	10.0	0
2422 TRUNK UG CABLE-FIBER SM	29.0	-9	5.8	3.6	0
2422 TRUNK UG CABLE-MET	10.7	-3	44.3	5.5	11326
2423 SUBR BUR CA	19.2	-9	34.3	3.9	7644
2423 TRUNK BUR CA-METAL	9.4	-4	49.2	5.8	911
2423 TRUNK BURIED CA-FIBER	27.0	-2	5.4	3.6	0
2424 SUBMARINE CABLE-FIBER	18.4	-5	15.4	4.9	0
2424 SUBMARINE CABLE-METAL	17.6	-10	51.2	3.3	-40
2431 AERIAL WIRE	5.4	-29	66.2	11.6	150
2441 U G CONDUIT-MAIN	48.0	-20	27.0	1.9	5654
2441 U G CONDUIT-SUBSIDIARY	40.0	-12	22.7	2.2	-551

The figures in Columns B, C, and D are percentages of gross book cost. The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988 and as amended by Erratum DA 88-203, released February 19,1988, are continued.

@ As described in paragraph 21 of the Order, the net service value for the Xbar Adjunct Account is to be amortized over 45 months ending September 30, 1992.

(1) COT Crossbar, Crossbar Adjuncts, and Circuit Other have an April 1, 1989 effective date.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - IOWA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.6	17	50.1	9.1	0
2114	SPECIAL PURPOSE VEHICLES	15.0	10	0.0	6.0	0
2115	GARAGE WORK EQPT	8.2	10	56.7	4.1	-5
2116	OTHER WORK EQPT	8.4	10	39.8	6.0	-56
2121	BUILDINGS	30.0	7	22.4	2.4	346
2122	FURNITURE	10.2	2	42.8	5.4	242
2123	COMPANY COMM EQPT	4.8	5	49.1	9.6	0
2123	OFFICE EQPT	5.1	2	54.1	8.6	79
2124	GEN'L PURPOSE COMPUTERS	3.0	5	61.4	11.2	0
2211	ELECTRONIC SWITCHING ANALOG	8.6	3	43.6	6.2	4873
2212	ELECTRONIC SWITCHING DIGITAL	14.2	4	10.8	6.0	0
2215	CROSSBAR SWITCHING	2.1	-3	86.9	7.7	0
2215	STEP BY STEP SWITCHING	3.5	-7	99.8	2.1	0
2220	OPERATOR SYSTEMS	3.6	2	54.2	12.2	0
2231	RADIO SYSTEMS	8.1	-4	45.7	7.2	269
2232	CIRCUIT-ANALOG	7.1	4	48.8	6.6	517
2232	CIRCUIT-DDS	6.3	0	37.3	10.0	30
2232	CIRCUIT-DIGITAL	9.2	5	24.3	7.7	597
2351	PUBLIC TEL TERM EQPT	6.7	5	38.0	8.5	-122
2362	OTHER TERM EQPT	5.0	5	76.0	3.8	-14
2411	POLE LINES	6.2	-74	111.1	10.1	0
2421	AERIAL CABLE MET	9.5	-27	71.7	5.8	2043
2421	AERIAL CABLE NON-MET	18.2	-33	-2.6	7.5	0
2422	UNDGR CABLE MET	17.3	-5	49.0	3.2	3369
2422	UNDGR CABLE NON-MET	17.9	-22	13.3	6.1	0
2423	BURIED CABLE MET	16.5	-10	48.1	3.8	9035
2423	BURIED CABLE NON-MET	19.1	-7	11.3	5.0	0
2424	SUB CABLE MET	10.4	-2	71.5	2.9	-4
2424	SUB CABLE NON-MET	32.0	-2	0.0	3.2	0
2426	INTRABUILDING CABLE-MET	10.6	-41	78.5	5.9	522
2426	INTRABUILDING CABLE-NON MET	18.2	-39	14.9	6.8	0
2431	AERIAL WIRE	3.6	-25	116.0	2.5	0
2441	CONDUIT SYSTEMS	33.0	-15	52.8	1.9	3530

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - MINNESOTA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	4.3	15	45.2	9.3	0
2113	AIRCRAFT	—	35	65.0	5.0	0
2114	SPECIAL PURPOSE VEHICLES	7.8	10	30.8	7.6	0
2115	GARAGE WORK EQPT	7.7	10	18.9	9.2	0
2116	OTHER WORK EQPT	7.9	10	36.1	6.8	15
2121	BUILDINGS	31.0	6	20.4	2.4	1168
2122	FURNITURE	9.5	2	29.2	7.2	466
2123	COMPANY COMM EQPT	5.5	5	31.5	11.5	-97
2123	OFFICE EQPT	6.7	2	49.5	7.2	105
2124	GEN'L PURPOSE COMPUTERS	2.7	5	63.9	11.5	0
2211	ELECTRONIC SWITCHING ANALOG	8.4	2	39.6	7.0	7108
2212	ELECTRONIC SWITCHING DIGITAL	12.9	3	10.0	6.7	0
2215	CROSSBAR SWITCHING	2.0	-2	60.1	21.0	0
2215	STEP BY STEP SWITCHING	3.1	-5	81.5	7.6	0
2220	OPERATOR SYSTEMS	6.6	2	52.3	6.9	0
2231	RADIO SYSTEMS	7.7	-4	43.0	7.9	24
2232	CIRCUIT-ANALOG	6.5	4	42.8	8.2	1709
2232	CIRCUIT-DIGITAL	8.0	5	25.0	8.8	0
2232	CIRCUIT-DDS	6.2	0	35.6	10.4	6
2351	PUBLIC TEL TERM EQPT	5.8	5	35.8	10.2	-231
2362	OTHER TERM EQPT	5.3	5	76.4	3.5	-31
2411	POLE LINES	6.6	-60	126.8	5.0	0
2421	AERIAL CABLE MET	9.7	-25	58.1	6.9	3096
2421	AERIAL CABLE NON-MET	15.7	-21	14.9	6.8	0
2422	UNDGR CABLE MET	17.5	3	40.1	3.3	6601
2422	UNDGR CABLE NON-MET	18.4	-16	8.5	5.8	0
2423	BURIED CABLE MET	16.4	-9	39.3	4.3	9677
2423	BURIED CABLE NON-MET	20.0	-5	6.5	4.9	0
2424	SUB CABLE MET	11.0	-1	57.5	4.0	-14
2424	SUB CABLE NON-MET	23.0	-1	7.8	4.1	0
2426	INTRABUILDING CABLE-MET	11.3	-28	76.7	4.5	1428
2426	INTRABUILDING CABLE-NON MET	17.9	-21	22.6	5.5	0
2431	AERIAL WIRE	4.2	-31	122.9	1.9	0
2441	CONDUIT SYSTEMS	37.0	-15	39.2	2.0	5774

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - NEBRASKA

Effective January 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 MOTOR VEHICLES	3.6	15	46.7	10.6	0
2114 SPECIAL PURPOSE VEHICLES	7.9	10	12.3	9.8	0
2115 GARAGE WORK EQPT	7.9	10	67.3	2.9	0
2116 OTHER WORK EQPT	8.1	10	42.7	5.8	0
2121 BUILDINGS	36.0	3	18.6	2.2	776
2122 FURNITURE	12.7	7	28.8	5.1	172
2123 COMPANY COMM EQPT	6.7	5	39.9	8.2	0
2123 OFFICE EQPT	9.0	5	40.0	6.1	107
2124 GEN'L PURPOSE COMPUTERS	3.7	5	35.0	16.2	0
2211 ELECTRONIC-ANALOG	9.1	2	38.2	6.6	2540
2212 ELECTRONIC-DIGITAL	12.1	3	16.1	6.7	0
2215 CROSSBAR SWITCHING	2.5	-4	84.2	7.9	0
2215 STEP BY STEP SWITCHING	2.8	-8	82.5	9.1	0
2220 OPERATOR SYSTEMS	6.3	2	56.1	6.7	0
2231 RADIO SYSTEMS	8.1	-5	53.4	6.4	127
2232 CIRCUIT ANALOG	6.9	4	49.5	6.7	473
2232 CIRCUIT DDS	5.7	0	-3.4	18.1	22
2232 CIRCUIT DIGITAL	8.7	5	20.8	8.5	0
2351 PUBLIC TEL TERM EQPT	4.8	5	46.7	10.1	-110
2362 OTHER TERM EQPT	4.5	5	64.6	6.8	-11
2411 POLE LINES	6.0	-25	-14.4	23.2	0
2421 AERIAL CABLE MET	9.5	-30	61.2	7.2	399
2421 AERIAL CABLE NON-MET	15.8	-35	-7.6	9.0	0
2422 UNDGR CABLE MET	16.9	-11	45.1	3.9	1852
2422 UNDGR CABLE NON-MET	21.0	-18	10.2	5.1	0
2423 BURIED CABLE MET	16.0	-10	45.6	4.0	3447
2423 BURIED CABLE NON-MET	24.0	-7	4.9	4.3	0
2424 SUB CABLE MET	16.2	-2	37.7	4.0	-16
2424 SUB CABLE NON-MET	23.0	-2	2.9	4.3	0
2426 INTRABUILDING CABLE-MET	10.9	-36	61.7	6.8	406
2426 INTRABUILDING CABLE-NON-MET	18.5	-31	23.5	5.8	0
2431 AERIAL WIRE	3.9	-29	95.3	8.6	@
2441 CONDUIT SYSTEMS	41.0	-15	42.4	1.8	1542

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts except for Aerial Wire as indicated below.

@ Annual amortization of $225,684, ordered in FCC 83-587, released December 20, 1983, continues for a one year period ending December 31, 1990.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - NORTH DAKOTA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.9	14	64.5	5.5	0
2114	SPECIAL PURPOSE VEHICLES	14.0	10	0.0	6.4	0
2115	GARAGE WORK EQPT	7.9	10	41.3	6.2	1
2116	OTHER WORK EQPT	8.1	10	47.9	5.2	33
2121	BUILDINGS	25.0	10	24.9	2.6	56
2122	FURNITURE	8.7	2	38.6	6.8	41
2123	COMPANY COMM EQPT	4.7	5	49.7	9.6	0
2123	OFFICE EQPT	7.0	3	69.3	4.0	34
2124	GEN'L PURPOSE COMPUTERS	3.1	5	53.6	13.4	0
2211	ELECTRONIC ANALOG	9.7	3	40.3	5.8	597
2212	ELECTRONIC DIGITAL	13.7	4	11.8	6.1	0
2215	CROSSBAR SWITCHING	1.2	-5	86.6	15.3	0
2215	STEP BY STEP SWITCHING	3.9	-5	89.1	4.1	0
2220	OPERATOR SYSTEMS	4.3	2	38.1	13.9	21
2231	RADIO SYSTEMS	7.0	-3	50.2	7.5	4
2232	CIRCUIT - ANALOG	7.5	4	42.7	7.1	252
2232	CIRCUIT - DDS	12.0	0	0.0	8.3	0
2232	CIRCUIT - DIGITAL	9.5	5	22.1	7.7	134
2351	PUB TELE TERM EQPT	4.1	5	32.9	15.1	-84
2362	OTHER TERM EQPT	4.8	5	49.1	9.6	-4
2411	POLE LINES	6.2	-50	90.2	9.6	0
2421	AERIAL CABLE MET	9.5	-46	71.3	7.9	359
2421	AERIAL CABLE NON-MET	17.6	-46	24.9	6.9	0
2422	UNDGR CABLE MET	18.4	-5	46.0	3.2	631
2422	UNDGR CABLE NON-MET	21.0	-17	12.3	5.0	0
2423	BURIED CABLE MET	17.0	-5	44.3	3.6	2909
2423	BURIED CABLE NON-MET	19.5	-5	6.2	5.1	0
2424	SUB CABLE MET	17.9	0	43.9	3.1	-1
2424	SUB CABLE NON-MET	32.0	0	0.0	3.1	0
2426	INTRABUILDING CABLE-MET	8.8	-24	62.8	7.0	211
2426	INTRABUILDING CABLE-NON MET	15.2	-17	2.4	7.5	0
2431	AERIAL WIRE	4.0	-22	9.9	28.0	@
2441	CONDUIT SYSTEMS	40.0	-15	32.6	2.1	521

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts except for Aerial Wire as indicated below.

@ Annual amortization of $22,368, ordered in FCC 83-587, released December 20, 1983, continues for a one year period ending December 31, 1990.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - SOUTH DAKOTA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.3	20	49.8	9.2	0
2114	SPECIAL PURPOSE VEHICLES	14.0	10	0.0	6.4	0
2115	GARAGE WORK EQPT	7.5	10	46.6	5.8	0
2116	OTHER WORK EQPT	7.7	10	54.4	4.6	15
2121	BUILDINGS	22.0	10	27.9	2.8	138
2122	FURNITURE	8.5	5	49.7	5.3	84
2123	COMPANY COMM EQPT	4.4	5	62.2	7.5	0
2123	OFFICE EQPT	5.2	5	40.2	10.5	0
2124	GEN'L PURPOSE COMPUTERS	2.5	5	63.1	12.8	0
2211	ELECTRONIC ANALOG	9.0	2	44.1	6.0	823
2212	ELECTRONIC DIGITAL	13.2	3	13.4	6.3	0
2215	CROSSBAR SWITCHING	2.9	-5	77.4	9.5	0
2215	STEP BY STEP SWITCHING	3.2	-5	88.1	5.3	0
2220	OPERATOR SYSTEMS	4.3	2	52.6	10.6	0
2231	RADIO SYSTEMS	8.5	-2	36.7	7.7	113
2232	CIRCUIT ANALOG	7.7	4	47.7	6.3	122
2232	CIRCUIT DDS	12.0	0	3.7	8.0	0
2232	CIRCUIT DIGITAL	9.1	5	16.7	8.6	55
2351	PUB TELE TERM EQPT	3.9	5	50.5	11.4	-56
2362	OTHER TERM EQPT	5.5	5	44.3	9.2	-3
2411	POLE LINES	7.1	-37	98.5	5.4	601
2421	AERIAL CABLE MET	9.8	-44	69.4	7.6	421
2421	AERIAL CABLE NON-MET	15.8	-36	-6.0	9.0	0
2422	UNDGR CABLE MET	18.3	0	43.7	3.1	852
2422	UNDGR CABLE NON-MET	13.5	-13	15.7	7.2	0
2423	BURIED CABLE MET	16.4	-10	48.4	3.8	3271
2423	BURIED CABLE NON-MET	21.0	-7	9.4	4.6	0
2424	SUB CABLE MET	10.9	0	58.7	3.8	2
2424	SUB CABLE NON-MET	32.0	0	0.0	3.1	0
2426	INTRABUILDING CABLE-MET	11.6	-14	67.1	4.0	292
2426	INTRABUILDING CABLE-NON MET	19.0	-10	40.9	3.6	0
2431	AERIAL WIRE	2.6	-27	69.5	22.1	@
2441	CONDUIT SYSTEMS	40.0	-11	31.0	2.0	492

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts except for Aerial Wire as indicated below.

@ Annual amortization of $375,875, ordered in FCC 83-587, released December 20, 1983, continues for a two year period ending December 31, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - FLORIDA

Effective October 1, 1989

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	Motor Vehicles	1.6	21	64.5	9.1	0
2116	Spl Veh & Other Work	8.7	2	28.4	8.0	-821
2121	Buildings	36.0	4	15.9	2.2	-960
2122	Furniture	8.7	2	30.8	7.7	589
2123	Office Equipment	4.1	18	27.5	13.3	730
2124	General Purpose Comp	2.9	0	60.6	13.6	0
2211	Analog ESS	6.8	0	42.9	8.4	29816
2212	Digital ESS	12.9	1	14.6	6.5	1242
2215	Step-by-Step	-	0	-	-	@
2215	Crossbar	-	0	-	-	@
2220	Operator Sys.- XBAR	-	0	-	-	*
2220	Operator Sys. - ESS	8.7	0	29.7	8.1	365
2231	Radio Systems	2.7	-5	86.3	6.9	0
2232	Circuit-DDS	4.9	2	52.6	9.3	287
2232	Circuit-Other	6.8	0	34.7	9.6	16782
2311	Station Apparatus	5.2	1	41.7	11.0	0
2341	Large PBX	3.6	-4	32.2	19.9	0
2351	Public Telephone	3.0	20	59.3	6.9	0
2362	Other Terminal Equip	3.2	-4	61.3	13.3	-465
2411	Poles	22.0	-56	43.2	5.1	-26
2421	Aerial Cable Metal	11.6	-12	41.3	6.1	1834
2421	Aerial Cable Fiber	12.6	-18	20.0	7.8	-16
2422	UG Cable Metal	15.7	-6	31.3	4.8	6316
2422	UG Cable Fiber	17.9	-18	19.1	5.5	41
2423	Buried Cable Metal	12.5	-11	36.4	6.0	35026
2423	Buried Cable Fiber	14.3	-13	16.1	6.8	1
2424	Submarine Cable	12.4	-5	47.6	4.6	95
2426	Intra-Bldg Netwk Cab	13.3	-12	39.0	5.5	235
2431	Aerial Wire	-	-20	120.0	5.0	0
2441	Conduit System	43.0	-5	20.4	2.0	4839

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, and as amended by Erratum DA 88-201, released Febuary 19, 1988, are continued for all accounts except for Step-by-Step, Crossbar, and Operator Systems-Crossbar as indicated below.

@ As described in paragraph 21 of the Order, the net service values for the Step-by-Step and Crossbar Accounts are to be amortized over a three month period ending December 31, 1989.

* As described in paragraph 21 of the Order, the net service value for the Operator Systems-Crossbar Account is to be amortized over a two year period ending September 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - GEORGIA

Effective October 1, 1989

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	Motor Vehicles	2.0	23	56.0	10.5	-844
2113	Aircraft	3.5	60	30.6	2.7	6
2116	Spl Veh & Other Work	7.9	1	28.6	8.9	-411
2121	Buildings	31.0	4	22.2	2.4	2209
2122	Furniture	9.5	4	34.1	6.5	1314
2123	Office Equipment	4.7	18	30.2	11.0	408
2124	General Purpose Comp	3.0	0	51.9	16.0	519
2211	Analog ESS	6.9	0	42.3	8.4	27150
2212	Digital ESS	12.8	1	12.5	6.8	811
2215	Step-by-Step	-	-1	-	-	@
2215	Crossbar	-	-1	-	-	@
2220	Operator Sys.- XBAR	-	-1	-	-	#
2220	Operator Sys. - ESS	10.7	1	20.8	7.3	156
2231	Radio Systems	4.3	-5	61.2	10.2	397
2232	Circuit-DDS	4.9	1	51.9	9.6	593
2232	Circuit-Other	6.7	0	31.4	10.2	10179
2311	Station Apparatus	7.0	0	40.9	8.4	0
2341	Large PBX	3.0	-4	87.5	5.5	0
2351	Public Telephone	3.5	20	61.7	5.2	301
2362	Other Terminal Equip	4.4	-4	69.2	7.9	675
2411	Poles	17.6	-44	27.2	6.6	-2530
2421	Aerial Cable Metal	11.7	-16	38.1	6.7	4077
2421	Aerial Cable Fiber	14.4	-16	9.1	7.4	-2
2422	UG Cable Metal	15.4	-7	34.4	4.7	10924
2422	UG Cable Fiber	18.4	-16	14.8	5.5	128
2423	Buried Cable Metal	13.4	-6	33.6	5.4	11364
2423	Buried Cable Fiber	13.3	-4	13.4	6.8	-64
2424	Submarine Cable	11.6	-9	37.3	6.2	18
2426	Intra-Bldg Netwk Cab	12.4	-16	35.8	6.5	208
2431	Aerial Wire	5.5	-50	103.8	8.4	1726
2441	Conduit System	48.0	-5	15.7	1.9	1083

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 86-603, released January 22, 1987, are continued for all accounts except for Step-by-Step, Crossbar and Operator Systems-Crossbar as indicated below.

@ As described in paragraph 21 of the Order, the net service values for the Step-by-Step and Crossbar Accounts are to be amortized over a twelve month period ending September 30, 1990.

As described in paragraph 21 of the Order, the net service value for the Operator Systems-Crossbar Account is to be amortized over a two year period ending September 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - NORTH CAROLINA

Effective October 1, 1989

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	Motor Vehicles	2.6	17	55.5	10.6	-147
2116	Spl Veh & Other Work	7.6	1	31.7	8.9	470
2121	Buildings	33.0	3	22.4	2.3	920
2122	Furniture	8.3	3	25.3	8.6	211
2123	Office Equipment	5.2	19	17.8	12.2	-670
2124	General Purpose Comp	3.1	0	46.2	17.4	-778
2211	Analog ESS	6.0	0	42.4	9.6	8716
2212	Digital ESS	12.9	1	14.3	6.6	954
2215	Step-by-Step	-	0	-	-	@
2215	Crossbar	-	0	-	-	@
2220	Operator Sys.- XBAR	-	0	-	-	@
2220	Operator Sys. - ESS	10.7	1	21.2	7.3	72
2231	Radio Systems	3.5	-1	77.1	6.8	296
2232	Circuit-DDS	5.7	2	32.1	11.6	148
2232	Circuit-Other	5.4	0	33.0	12.4	8849
2311	Station Apparatus	9.2	1	48.0	5.5	0
2341	Large PBX	3.0	0	6.8	31.1	0
2351	Public Telephone	2.8	20	70.7	3.3	868
2362	Other Terminal Equip	4.3	-4	61.3	9.9	1144
2411	Poles	19.6	-48	37.6	5.6	-656
2421	Aerial Cable Metal	12.4	-7	42.2	5.2	1269
2421	Aerial Cable Fiber	16.2	-11	12.5	6.1	2
2422	UG Cable Metal	16.2	-7	34.0	4.5	2308
2422	UG Cable Fiber	19.6	-11	12.4	5.0	1
2423	Buried Cable Metal	13.6	-7	34.7	5.3	9613
2423	Buried Cable Fiber	18.0	-3	9.6	5.2	-39
2424	Submarine Cable	11.7	-3	39.6	5.4	6
2426	Intra-Bldg Netwk Cab	13.0	-7	39.4	5.2	74
2431	Aerial Wire	4.0	-49	129.8	4.8	0
2441	Conduit System	47.0	-5	18.5	1.8	331

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 86-603, released January 22, 1987, are continued for all accounts except for Step-by-Step, Crossbar and Operator Systems-Crossbar as indicated below.

@ As described in paragraph 21 of the Order, the net service values for the Step-by-Step Crossbar and Operator Systems-Crossbar Accounts are to be amortized over a two year period ending September 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - SOUTH CAROLINA

Effective October 1, 1989

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	Motor Vehicles	2.5	18	56.7	10.1	0
2116	Spl Veh & Other Work	8.2	1	34.0	7.9	-201
2121	Buildings	30.0	4	26.6	2.3	720
2122	Furniture	10.6	3	19.9	7.3	75
2123	Office Equipment	5.8	18	10.7	12.3	-149
2124	General Purpose Comp	2.9	0	57.5	14.7	0
2211	Analog ESS	6.3	0	38.3	9.8	4043
2212	Digital ESS	12.9	1	14.1	6.6	36
2215	Step-by-Step	-	0	-	-	@
2215	Crossbar	-	0	-	-	@
2220	Operator Sys.- XBAR	-	0	-	-	#
2220	Operator Sys. - ESS	13.2	1	10.9	6.7	0
2231	Radio Systems	4.5	-7	60.9	10.2	0
2232	Circuit-DDS	5.2	2	34.9	12.1	6
2232	Circuit-Other	5.4	0	29.0	13.1	4875
2311	Station Apparatus	8.3	2	76.7	2.6	0
2341	Large PBX	2.6	0	56.2	16.8	0
2351	Public Telephone	2.9	20	66.9	4.5	0
2362	Other Terminal Equip	4.2	-4	63.9	9.5	-3
2411	Poles	23.0	-37	27.9	4.7	-1231
2421	Aerial Cable Metal	13.0	-13	45.5	5.2	1959
2421	Aerial Cable Fiber	15.5	-13	15.4	6.3	-1
2422	UG Cable Metal	18.1	-12	36.0	4.2	2619
2422	UG Cable Fiber	19.9	-13	17.0	4.8	82
2423	Buried Cable Metal	14.5	-9	34.5	5.1	6836
2423	Buried Cable Fiber	17.3	-14	15.6	5.7	-32
2424	Submarine Cable	12.5	-1	40.7	4.8	11
2426	Intra-Bldg Netwk Cab	13.7	-13	30.1	6.1	187
2431	Aerial Wire	-	-44	144.0	5.0	0
2441	Conduit System	48.0	-5	17.8	1.8	115

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E ordered in DA 88-201, released February 19, 1988, are continued for all accounts except for Step-by-Step, Crossbar and Operator Systems-Crossbar as indicated below.

@ As described in paragraph 21 of the Order, the net service values for the Step-by-Step and Crossbar Accounts are to be amortized over a three year period ending September 30, 1992.

As described in paragraph 21 of the Order, the net service value for the Operator Systems-Crossbar Account is to be amortized over a two year period ending September 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - ARKANSAS

Effective January 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	4.8	20	42.3	7.9	-32
2115	GARAGE WORK EQT	10.5	1	-28.4	12.1	1
2116	OTHER WORK EQT	10.6	1	30.0	6.5	101
2121	BUILDINGS	32.0	4	22.4	2.3	-33
2122	FURN-OFFICE/SUPPORT	13.6	1	35.6	4.7	61
2123	OFFICE SUPPORT	8.2	1	21.0	9.5	20
2123	OFFIC. COM. EQT	4.1	2	56.4	10.1	0
2124	GNL. PURP. COMPUTERS	4.9	9	44.2	9.6	0
2211	ANALOG ELECTRONIC	9.9	3	38.4	5.9	3511
2212	DIGITAL ELECTRONIC	12.9	5	14.5	6.2	45
2215	STEP-BY-STEP	4.4	1	73.5	5.8	0
2215	CROSSBAR	5.1	0	45.4	10.7	0
2220	OPERATOR SYSTEMS	6.0	0	55.8	7.4	0
2231	RADIO	10.5	5	27.3	6.4	-60
2232	DIGITAL CKT-OTHER	7.1	4	22.2	10.4	335
2232	DIGITAL DATA SYSTEMS	4.9	10	29.8	12.3	0
2232	ANALOG CIRCUIT-OTHER	6.5	0	37.0	9.7	2203
2311	STA APP-TELETYPE	2.5	2	11.1	34.8	0
2311	STA APP-TEL & MIS	3.4	-2	26.8	22.1	0
2341	LPBX	4.2	-2	29.3	17.3	0
2351	PUBLIC TELEPHONE	3.7	0	65.7	9.3	0
2362	OTHER TERMINAL EQT	5.3	-2	92.3	1.8	0
2411	POLES	17.0	-98	55.6	8.4	530
2421	AERIAL CA-EXCHANGE	14.7	-50	62.5	6.0	2507
2421	AERIAL CA-TOLL	12.3	-49	22.5	10.3	59
2422	UNDRGRND CA-EX MET	19.5	-46	31.8	5.9	925
2422	UNDRGRND CA-TOLL MET	10.1	-43	63.2	7.9	148
2422	UNDRGRND CA-EX FIB	22.0	-10	10.8	4.5	0
2422	UNDRGRND CA-TOLL FIB	19.1	-10	20.3	4.7	0.
2423	BURIED CA-EX MET	14.7	-11	38.2	5.0	8333
2423	BURIED CA-TOLL MET	11.6	-4	37.1	5.8	892
2423	BURIED CA-EX FIBER	24.0	-10	6.4	4.3	0
2423	BURIED CA-TOLL FIBER	17.6	-10	8.4	5.8	0
2424	SUBMARINE CA	16.1	-5	33.9	4.4	1
2426	INTRABLDG CA	11.0	-36	49.1	7.9	144
2431	AERIAL WIRE-EXCH	5.3	-143	60.9	34.4	0
2441	UNDERGROUND CONDUIT	46.0	-6	21.7	1.8	354

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - KANSAS

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-C-B)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.9	14	47.2	9.9	0
2115	GARAGE WORK EQT	9.0	3	-23.4	13.4	-1
2116	OTHER WORK EQT	9.9	3	35.3	6.2	-81
2121	BUILDINGS	28.0	6	25.6	2.4	-187
2122	FURN-OFFICE/SUPPORT	19.0	6	15.6	4.1	-22
2123	OFFICE SUPPORT	8.1	6	3.1	11.2	-3
2123	OFFIC. COM. EQT	4.9	1	59.2	8.1	0
2124	GNL. PURP. COMPUTERS	4.2	4	50.8	10.8	0
2211	ANALOG ELECTRONIC	9.7	3	39.7	5.9	3258
2212	DIGITAL ELECTRONIC	12.9	5	13.9	6.3	45
2215	STEP-BY-STEP	6.2	-2	62.7	6.3	-122
2215	CROSSBAR	3.4	-5	37.4	19.9	0
2220	OPERATOR SYSTEMS	7.4	0	17.6	11.1	0
2231	RADIO	10.3	5	43.2	5.0	64
2232	DIGITAL CKT-OTHER	8.0	4	23.1	9.1	354
2232	DIGITAL DATA SYSTEMS	4.4	10	35.7	12.3	0
2232	ANALOG CIRCUIT-OTHER	7.5	0	49.9	6.7	1582
2311	STA APP-TELETYPE	3.5	1	0.0	28.3	0
2311	STA APP-TEL & MIS	7.8	-2	89.5	1.6	33
2341	LPBX	4.6	-2	96.2	1.3	0
2351	PUBLIC TELEPHONE	6.8	3	47.4	7.3	349
2362	OTHER TERMINAL EQT	5.3	-2	67.1	6.6	0
2411	POLES	10.7	-86	74.1	10.5	1394
2421	AERIAL CA-EXCHANGE	14.7	-31	45.1	5.8	1575
2421	AERIAL CA-TOLL	16.1	-7	69.6	2.3	17
2422	UNDRGRND CA-EX MET	19.2	-28	42.4	4.5	1993
2422	UNDRGRND CA-TOLL MET	10.4	-22	51.0	6.8	221
2422	UNDRGRND CA-EX FIB	22.0	-10	13.3	4.4	0
2422	UNDRGRND CA-TOLL FIB	19.2	-10	12.2	5.1	0
2423	BURIED CA-EX MET	14.3	-14	36.4	5.4	5453
2423	BURIED CA-TOLL MET	11.4	-2	47.9	4.7	570
2423	BURIED CA-EX FIBER	20.0	-10	8.7	5.1	0
2423	BURIED CA-TOLL FIBER	17.5	-10	8.2	5.8	0
2424	SUBMARINE CA	11.0	-1	52.9	4.4	11
2426	INTRABLDG CA	11.8	-17	27.9	7.6	92
2431	AERIAL WIRE-EXCH	4.0	-79	50.7	32.1	0
2441	UNDERGROUND CONDUIT	51.0	-6	20.9	1.7	95

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - MISSOURI

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.7	14	48.2	10.2	0
2115	GARAGE WORK EQT	8.3	5	43.0	6.3	1
2116	OTHER WORK EQT	9.1	5	30.8	7.1	73
2121	BUILDINGS	40.0	4	20.6	1.9	-127
2122	FURN-OFFICE/SUPPORT	14.3	7	21.5	5.0	-617
2123	OFFICE SUPPORT	6.2	7	14.6	12.6	-436
2123	OFFIC. COM. EQT	5.7	18	56.7	4.4	0
2124	GNL. PURP. COMPUTERS	4.2	11	38.6	12.0	0
2211	ANALOG ELECTRONIC	9.0	4	44.2	5.8	10094
2212	DIGITAL ELECTRONIC	12.9	10	12.7	6.0	-61
2215	STEP-BY-STEP	-	0	-	-	@
2215	CROSSBAR	-	0	-	-	@
2220	OPERATOR SYSTEMS	7.8	1	23.2	9.7	0
2231	RADIO	11.8	15	27.5	4.9	-211
2232	DIGITAL CKT-OTHER	8.8	7	21.8	8.1	691
2232	DIGITAL DATA SYSTEMS	4.8	10	44.3	9.5	-144
2232	ANALOG CIRCUIT-OTHER	6.4	0	46.5	8.4	4242
2311	STA APP-TELETYPE	1.2	2	0.3	81.4	0
2311	STA APP-TEL & HIS	4.9	-2	44.3	11.8	-35
2341	LPBX	4.2	10	72.1	4.3	0
2351	PUBLIC TELEPHONE	7.0	10	63.5	3.8	769
2362	OTHER TERMINAL EQT	5.3	1	68.9	5.7	0
2411	POLES	22.0	-85	63.5	5.5	1221
2421	AERIAL CA-EXCHANGE	18.3	-24	48.7	4.1	4013
2421	AERIAL CA-TOLL	16.0	-12	70.6	2.6	62
2422	UNDRGRND CA-EX MET	19.2	-31	38.9	4.8	3244
2422	UNDRGRND CA-TOLL MET	9.5	-5	43.8	6.4	411
2422	UNDRGRND CA-EX FIB	22.0	-8	13.6	4.3	0
2422	UNDRGRND CA-TOLL FIB	19.1	-8	13.4	5.0	0
2423	BURIED CA-EX MET	19.0	-10	31.6	4.1	7821
2423	BURIED CA-TOLL MET	13.1	-3	45.1	4.4	1501
2423	BURIED CA-EX FIBER	21.0	-5	10.8	4.5	0
2423	BURIED CA-TOLL FIBER	17.4	-5	1.2	6.0	0
2424	SUBMARINE CA	12.0	-1	19.9	6.8	1
2426	INTRABLDG CA	18.4	-24	19.1	5.7	393
2431	AERIAL WIRE-EXCH	6.1	-127	131.8	15.6	654
2441	UNDERGROUND CONDUIT	49.0	-6	23.7	1.7	371

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, and as amended by Erratum DA 88-203, released February 19, 1988, are continued.

@ As described in paragraph 21 of the Order, the net service values for the Step-by-Step and Crossbar accounts are to be amortized over a three year period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - OKLAHOMA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	4.3	15	34.8	11.7	-247
2115	GARAGE WORK EQT	9.3	0	43.0	6.1	2
2116	OTHER WORK EQT	10.0	0	37.4	6.3	159
2121	BUILDINGS	28.0	3	30.0	2.4	698
2122	FURN-OFFICE/SUPPORT	18.4	7	24.6	3.7	-66
2123	OFFICE SUPPORT	7.2	7	15.6	10.8	-21
2123	OFFIC. COM. EQT	4.1	2	64.0	8.3	6
2124	GNL. PURP. COMPUTERS	3.8	9	39.8	13.5	0
2211	ANALOG ELECTRONIC	9.4	4	42.4	5.7	4350
2212	DIGITAL ELECTRONIC	13.0	5	17.6	6.0	624
2215	STEP-BY-STEP	6.9	-10	45.3	9.4	-340
2215	CROSSBAR	2.7	-9	34.1	27.7	3671
2220	OPERATOR SYSTEMS	2.2	1	9.3	40.8	0
2220	OPERATOR SYSTEMS - MPP	10.0	0	0.0	10.0	0
2231	RADIO	11.3	5	35.9	5.2	-190
2232	DIGITAL CKT-OTHER	8.3	4	27.3	8.3	1423
2232	DIGITAL DATA SYSTEMS	5.8	10	45.6	7.7	-77
2232	ANALOG CIRCUIT-OTHER	7.0	0	59.3	5.8	8722
2311	STA APP-TELETYPE	3.7	2	14.6	22.5	0
2311	STA APP-TEL & MTS	10.4	-2	7.3	9.1	0
2341	LPBX	5.2	-2	65.0	7.1	0
2351	PUBLIC TELEPHONE	6.7	1	42.8	8.4	326
2362	OTHER TERMINAL EQT	5.1	-2	71.4	6.0	0
2411	POLES	16.4	-141	82.6	9.7	1183
2421	AERIAL CA-EXCHANGE	13.8	-45	56.7	6.4	3599
2421	AERIAL CA-TOLL	12.5	-50	99.1	4.1	87
2422	UNDRGRND CA-EX MET	18.8	-13	38.5	4.0	2678
2422	UNDRGRND CA-TOLL MET	12.3	-27	50.4	6.2	130
2422	UNDRGRND CA-EX FIB	22.0	-10	10.1	4.5	0
2422	UNDRGRND CA-TOLL FIB	19.1	-10	17.8	4.8	0
2423	BURIED CA-EX MET	14.3	-11	36.6	5.2	7154
2423	BURIED CA-TOLL MET	11.7	2	51.2	4.0	321
2423	BURIED CA-EX FIBER	22.0	-10	8.9	4.6	0
2423	BURIED CA-TOLL FIBER	17.5	-10	8.3	5.8	0
2424	SUBMARINE CA	8.8	5	68.6	3.0	2
2426	INTRABLDG CA	12.5	-38	70.3	5.4	1014
2431	AERIAL WIRE-EXCH	6.2	-109	115.8	15.0	817
2441	UNDERGROUND CONDUIT	52.0	-6	18.3	1.7	

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988 and as amended by Erratum DA 88-201, released Feburary 19, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHWESTERN BELL TELEPHONE COMPANY - TEXAS

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense (%) E
2112	MOTOR VEHICLES	5.1	10	36.8	10.4	-14
2115	GARAGE WORK EQT	7.6	5	29.9	8.6	-9
2116	OTHER WORK EQT	9.7	5	33.7	6.3	-188
2121	BUILDINGS	34.0	4	21.4	2.2	1934
2122	FURN-OFFICE/SUPPORT	15.3	4	20.8	4.9	-321
2123	OFFICE SUPPORT	6.7	4	7.0	13.3	-135
2123	OFFIC. COM. EQT	4.1	1	64.2	8.5	0
2124	GNL. PURP. COMPUTERS	3.2	13	50.4	11.4	0
2211	ANALOG ELECTRONIC	9.6	3	40.1	5.9	38571
2212	DIGITAL ELECTRONIC	12.9	10	13.9	5.9	841
2215	STEP-BY-STEP	4.2	-5	43.0	14.8	0
2215	CROSSBAR	4.0	-8	-16.6	31.2	0
2220	OPERATOR SYSTEMS	7.0	1	37.8	8.7	0
2231	RADIO	10.8	-5	31.7	6.8	-293
2232	DIGITAL CKT-OTHER	7.9	4	22.9	9.3	3692
2232	DIGITAL DATA SYSTEMS	6.7	10	49.6	6.0	0
2232	ANALOG CIRCUIT-OTHER	6.3	0	48.2	8.2	17816
2311	STA APP-TELETYPE	4.3	1	23.0	17.7	0
2311	STA APP-TEL & MIS	8.4	-2	3.1	11.8	2
2341	LPBX	5.4	-2	36.2	12.2	0
2351	PUBLIC TELEPHONE	4.8	2	58.9	8.1	2421
2362	OTHER TERMINAL EQT	5.1	-2	57.7	8.7	0
2411	POLES	21.0	-120	54.3	7.9	2953
2421	AERIAL CA-EXCHANGE	15.0	-37	42.0	6.3	15450
2421	AERIAL CA-TOLL	16.7	-18	67.2	3.0	254
2422	UNDRGRND CA-EX MET	21.0	-23	25.8	4.6	3998
2422	UNDRGRND CA-TOLL MET	10.4	-37	42.1	9.1	640
2422	UNDRGRND CA-EX FIB	22.0	-8	10.4	4.4	0
2422	UNDRGRND CA-TOLL FIB	19.1	-8	17.8	4.7	0
2423	BURIED CA-EX MET	14.5	-11	35.7	5.2	42893
2423	BURIED CA-TOLL MET	12.0	5	41.6	4.5	1517
2423	BURIED CA-EX FIBER	22.0	-5	12.4	4.2	0
2423	BURIED CA-TOLL FIBER	17.5	-5	9.7	5.4	0
2424	SUBMARINE CA	14.7	-2	39.2	4.3	21
2426	INTRABLDG CA	13.0	-26	38.1	6.8	1764
2431	AERIAL WIRE-EXCH	4.8	-53	103.9	10.2	791
2441	UNDERGROUND CONDUIT	53.0	-6	17.3	1.7	2700

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts..

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED INTER-MOUNTAIN TELEPHONE COMPANY - TENNESSEE

Effective July 1, 1989

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E	First Year ELG F
2112	MOTOR VEHICLES	4.8	23	32.3	9.3	-65	1989
2115	GARAGE WORK EQPT	8.7	0	5.6	10.9	0	
2116	OTHER WORK EQPT	8.0	5	25.8	8.7	-66	
2121	BUILDINGS	29.0	0	21.7	2.7	-353	1989
2122	FURNITURE	14.9	6	18.7	5.1	-28	1989
2123	OFFICE SUPPORT EQPT	15.0	6	19.1	5.0	0	1989
2123	OFFICIAL COMM EQPT	3.8	0	55.2	11.8	-42	
2124	GEN PURP COMPUTERS	4.3	5	46.3	11.3	0	1989
2211	ANALOG ELEC SWITCHING	4.5	-2	87.1	3.3	0	
2212	DIGITAL ELEC SWITCHING	11.9	3	24.1	6.1	218	
2215	STEP-BY-STEP	-	-4	-	-	@	
2220	OPERATOR SYSTEMS	-	-2	-	-	#	
2231	RADIO FAC-MOBILE	6.8	-10	81.4	4.2	0	1989
2231	RADIO FAC-OTHER	8.0	0	49.6	6.3	-32	1989
2232	CIRCUIT-ANALOG	7.6	0	29.9	9.2	0	1989
2232	CIRCUIT-DIGITAL	11.3	5	40.3	4.8	42	1989
2351	PUBLIC TELEPHONE - EQUIP	5.5	2	53.8	8.0	-20	
2351	PUBLIC TELEPHONE - INSTALL	5.2	2	44.9	10.2	0	
2362	SUBSCRIBER MULTIPLEX	2.5	0	49.7	20.1	-43	
2362	LINE CONDITIONING	2.4	0	72.3	11.5	0	
2362	SPECIAL COMM EQPT	8.5	0	0.0	11.8	0	
2411	POLES	20.0	-20	34.7	4.3	-233	1989
2421	AERIAL CABLE-METALIC	19.2	-25	30.0	4.9	-98	1989
2421	AERIAL CABLE-NONMETALIC	27.0	-10	13.1	3.6	0	1989
2422	UNDERGROUND CA-METALIC	21.0	-25	32.3	4.4	103	1989
2422	UNDERGROUND CA-NONMETALIC	32.0	-10	10.4	3.1	0	1989
2423	BURIED CABLE-METALIC	16.2	-9	34.9	4.6	145	1989
2423	BURIED CABLE-NONMETALIC	30.0	-5	1.3	3.5	0	1989
2424	SUBMARINE CABLE	-	0	100.0	5.0	0	1989
2426	INTRABUILDING CABLE	21.0	-25	21.1	4.9	0	1989
2431	AERIAL WIRE	3.5	-55	67.6	25.0	-10	
2441	CONDUIT SYSTEMS	41.0	-5	22.4	2.0	-133	1989

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts except Step-by-Step and Operator Systems as indicated below.

@ As described in paragraph 21 of the Order, the net service value of the Step-by-Step Account is to be amortized over a twelve month period ending June 30, 1990.

As described in paragraph 21 of the Order, the net service value of the Operator Systems Account is to be amortized over an eighteen month period ending December 31, 1990.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED INTER-MOUNTAIN TELEPHONE COMPANY - VIRGINIA

Effective January 1, 1989

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expens	First Year ELG
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E	F
2112	MOTOR VEHICLES	5.1	15	19.3	12.9	-20	1989
2115	GARAGE WORK EQPT	8.7	0	3.7	11.1	0	
2116	OTHER WORK EQPT	7.0	0	43.7	8.0	0	
2121	BUILDINGS	21.0	0	28.1	3.4	0	1989
2122	FURNITURE	10.5	5	-94.2	18.0	1	1989
2123	OFFICE SUPPORT EQPT	11.0	5	-4.7	9.1	0	1989
2123	OFFICIAL COMN EQPT	3.6	0	73.5	7.4	0	
2124	GEN PURP COMPUTERS	3.7	5	18.4	20.7	0	1989
2212	DIGITAL ELEC SWITCHING	11.9	3	20.2	6.5	49	
2215	STEP-BY-STEP	4.9	-4	73.8	6.2	139	
2215	CROSSBAR	5.5	-5	79.1	4.7	10	
2231	RADIO FAC-MOBILE	7.8	-10	40.4	8.9	1	1989
2231	RADIO FAC-OTHER	8.7	0	46.5	6.1	-34	1989
2232	CIRCUIT-ANALOG	7.9	0	58.9	5.2	183	1989
2232	CIRCUIT-DIGITAL	10.6	5	38.9	5.3	0	1989
2351	PUBLIC TELEPHONE - EQUIP	6.6	2	35.4	9.5	0	
2351	PUBLIC TELEPHONE - INSTALL	5.1	2	39.2	11.5	0	
2362	SUBSCRIBER MULTIPLEX	2.9	0	75.9	8.3	0	
2362	LINE CONDITIONING	3.1	0	68.6	10.1	0	
2411	POLES	16.1	-35	40.4	5.9	-30	1989
2421	AERIAL CABLE-METALIC	19.1	-35	32.4	5.4	36	1989
2421	AERIAL CABLE-NONMETALIC	30.0	-20	1.1	4.0	0	1989
2422	UNDRGRND CA-METALIC	21.0	-20	35.3	4.0	27	1989
2422	UNDRGRND CA-NONMETALIC	26.0	-10	16.2	3.6	0	1989
2423	BURIED CABLE-METALIC	13.7	-3	31.9	5.2	202	1989
2423	BURIED CABLE-NONMETALIC	30.0	-3	0.0	3.4	0	1989
2426	INTRABUILDING NETWK CA	22.0	-35	24.2	5.0	0	1989
2431	AERIAL WIRE	4.0	-65	65.0	25.0	18	
2441	CONDUIT SYSTEMS	35.0	0	28.4	2.0	0	1989

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
WISCONSIN BELL, INC.

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	2.5	10	59.8	12.1	0
2115	GARAGE WORK EQPT	9.1	4	29.9	7.3	0
2116	OTHER WORK EQPT	9.1	4	29.9	7.3	-6
2121	BUILDINGS	31.0	5	19.2	2.4	-193
2122	FURNITURE	9.2	18	18.9	6.9	-40
2123	OFFICE SUPPORT EQPT	6.7	18	0.5	12.2	-20
2123	COMPANY COMM EQPT	6.3	-5	37.6	10.7	0
2124	GEN. PURP. COMPUTERS	2.9	3	52.8	15.2	0
2211	ANALOG - E.S.S.	7.9	6	43.7	6.4	6301
2212	DIGITAL - E.S.S.	13.1	6	15.6	6.0	237
2215	STEP BY STEP	-	-6	-	-	@
2215	CROSSBAR	-	-6	-	-	#
2220	OPERATOR SYSTEMS	15.0	1	1.4	6.5	56
2231	RADIO SYSTEMS	7.9	2	27.4	8.9	-768
2232	CIRCUIT EQPT. DIGITAL	6.7	6	33.1	9.1	3229
2232	CIRCUIT EQPT. D.D.S.	4.4	9	30.7	13.7	193
2232	CIRCUIT EQPT. ANALOG	3.9	0	28.0	18.5	1748
2351	PUBLIC TEL. TERM. EQPT	4.3	0	59.4	9.4	0
2362	OTHER TERMINAL EQPT.	5.5	3	46.4	9.2	-2
2411	POLES	20.0	-92	57.4	6.7	-65
2421	AERIAL CABLE	13.5	-18	39.0	5.9	1379
2422	UNDERGROUND CABLE	19.1	0	27.7	3.8	1056
2423	BURIED CABLE	14.0	-7	32.3	5.3	2065
2424	SUBMARINE CABLE	13.6	2	33.1	4.8	-14
2426	INTRABUILDING CABLE	13.5	-19	29.9	6.6	345
2431	AERIAL WIRE	6.8	-45	54.4	13.3	0
2441	CONDUIT SYSTEMS	44.0	-15	36.1	1.8	2938

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued for all accounts except Step-by-Step and Crossbar as indicated below.

@ As described in paragraph 21 of the Order, the net service value of the Step-by-Step Account is to be amortized over a twenty-four month period ending December 31, 1991.

As described in paragraph 21 of the Order, the net service value of the Crossbar Account is to be amortized over a twelve month period ending December 31, 1990.

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